Supreme Court, U.S.
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88-672

No. .....

In The
Supreme Court of the United States
October Term, 1988

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TRIANGLE INDUSTRIES, INC., successor in interest to CENTRAL JERSEY INDUSTRIES, INC.,

Petitioner,

v.

STANLEY ZULKOWSKI, SR. and CLARA RUTH ZULKOWSKI, CONSOLIDATED RAIL CORPORATION, GARLOCK, INC., CERTAIN-TEED CORPORATION, RAYMARK INDUSTRIES, INC., a/k/a Raybestos-Manhattan, Inc., CELOTEX CORPORATION, and ARMSTRONG WORLD INDUSTRIES,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals below is in conflict with this Court's decision in *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), in that the Court below failed to recognize that Conrail was the reorganized company under the Rail Act with the obligation to honor claims which were inchoate at the time of the reorganization.

2. Whether § 1 of the Federal Employers' Liability Act, 45 U.S.C. § 51, can be construed to impose liability on a company which was not a railroad at the time claimant suffered FELA injury.

DESIGNATION OF CORPORATE RELATIONSHIPS

Petitioner Triangle Industries, Inc., successor in interest here to Central Jersey Industries, Inc., is not owned by any parent corporation and does not have any subsidiary or affiliate corporations, except wholly-owned corporations and except for direct or indirect majority ownership interests in National Can Cyprus, Ltd., National Can Iberia, S.A., National Can Italia, S.T.A., The Renaissance Insurance Company and Greenwich Realty Management Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

Triangle Industries, Inc., successor in interest here to Central Jersey Industries, Inc., petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

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OPINIONS BELOW

The Opinion of the Court of Appeals (App. *infra* 1a-15a) is reported at 852 F.2d 73. The Opinion of the District Court (App. 20a) was not officially reported.

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JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1988 (App. 16a). A Petition for Rehearing was denied on August 11, 1988 (App. 18a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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STATUTORY PROVISIONS INVOLVED

Section 1 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, portions of the Regional Rail Reorganization Act of 1973, as amended ("Rail Act"), 45 U.S.C. § 701 *et seq.* and portions of § 77 of the Bankruptcy Act of 1898, formerly 11 U.S.C. § 205 (repealed) are set forth in a statutory appendix (App. 32a).

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STATEMENT OF THE CASE

On March 22, 1967 the Central Railroad Company of New Jersey ("CNJ"), which was then a common carrier by railroad engaged in interstate commerce, filed a Peti-

tion for Reorganization under § 77 of the Bankruptcy Act of 1898, formerly 11 U.S.C. § 205. Several other Northeast railroads were also in separate similar reorganization proceedings at the time, and the rail crisis precipitated by the threatened shutdown of these railroads led to enactment of the Regional Rail Reorganization Act of 1973 (the "Rail Act"). Pursuant to the Rail Act, on April 1, 1976, CNJ ceased railroad operations and went out of the railroad business. All of CNJ's active rail properties and almost all of its employees and records were transferred, "free and clear of any liens or encumbrances" (Rail Act § 303(b)(2), 45 U.S.C. § 743(b)(2)), to Consolidated Rail Corporation ("Conrail") which, under the Rail Act, succeeded to all of CNJ's rail business along with the rail business, properties and employees of the other Northeast railroads in reorganization, including Penn Central, Lehigh Valley, Reading and Erie Lackawanna.

In accordance with Rail Act § 303(a)(1), 45 U.S.C. § 743(a)(1), Conrail deposited its equity securities with the Special Court created by the Rail Act in exchange for the rail assets received. These equity securities, along with Certificates of Value issued by the United States Railway Association ("USRA") guaranteeing the value of the Conrail securities to the extent of the liquidation value of the assets conveyed, as adjusted (45 U.S.C. § 746) were to be distributed to the transferor railroads at the conclusion of a Valuation Case in the Special Court determining the value of the assets conveyed by the transferor railroads. The transferors did not ultimately receive the Conrail equity securities, since the Rail Act was amended in 1981 to remove the equity securities from the compensation

package. 45 U.S.C. § 1115, added by Pub. L. 97-35, Title XI, § 1167(b), (c), 95 Stat. 686 (1981).

CNJ's reorganization proceedings were consummated on September 14, 1979. Central Jersey Industries, Inc. emerged as the reorganized company of CNJ's non-rail assets. The old CNJ corporate charter was surrendered, a restated and amended certificate of incorporation was filed and By-Laws were adopted on behalf of the new company. Remaining non-rail assets of CNJ were transferred, "free and clear of all claims" (Bankruptcy Act § 77(f)), to the new company. Thereafter, Central Jersey Industries, Inc., a New Jersey corporation, merged with a new Delaware corporation CJI Industries, Inc. which, in July, 1988, became Triangle Industries, Inc. (Although CJI Industries was a different corporation from Central Jersey Industries, these two corporations, along with Triangle will hereinafter be referred to collectively as "CJI"). In accordance with the CNJ Plan of Reorganization, all of the then issued stock of CJI was distributed to CNJ's secured creditors and the proceeds of the Valuation Case were dedicated to the payment of CNJ's creditors. CJI issued to various classes of creditors of CNJ a series of notes payable out of Valuation Case proceeds. The Valuation Case proceeds ultimately received for the CNJ assets transferred to Conrail were received by CJI in trust and paid over to the holders of these Notes according to their priority. The proceeds were insufficient to pay all Notes, with the result that CNJ's unsecured creditors and shareholders ultimately received nothing of value, and secured creditors were paid only in part.

Commencing in the early 1980's and continuing to this day, a stream of claims under the FELA and the Black

Lung Benefits Act, 30 U.S.C. § 901, *et seq.*, were filed by former rail employees. Cumulatively, they have sought recoveries far in excess of the net worth of CJI when it emerged from the reorganization proceedings in September of 1979. Similar claims were also filed against the other estates (or their respective successors) participating in the Conrail reorganization. CJI and Reading each obtained relief from such claims from its respective Reorganization Court, on the grounds that such claims had been discharged in the reorganization proceedings and were barred by the respective consummation orders. *In re Central Railroad Co. of New Jersey*, 38 Bankr. 686 (D.N.J. 1983); *Schweitzer v. Consolidated Rail Corp.*, 36 Bankr. 469 (E.D. Pa. 1984). Appeals from the CJI and Reading decisions were consolidated in *Schweitzer v. Consolidated Rail Corporation*, 758 F.2d 936 (3d Cir. 1985), *cert. den.* 474 U.S. 864 (1985), *on remand*, 65 Bankr. 794 (E.D. Pa. 1986). The Third Circuit reversed the judgments of the District Courts, and held that FELA actions for asbestos related injury do not exist before manifestation of injury; that plaintiffs' FELA claims were not within the class of "interests of whatever character" subject to discharge under § 77(f) at the time of consummation and discharge; and that plaintiffs, at the time of the alleged exposure, had no legal relationship with their employers from which an "interest", within the meaning of § 77(b), could flow.

In December, 1986, Plaintiff Stanley Zulkowski and his wife brought this action against CJI and Conrail under the FELA and against others, on the grounds that he had suffered personal injuries from exposures to asbestos and other harmful substances while employed by CNJ and Conrail, which injuries had only recently become manifest.

CJI moved for summary judgment dismissing the Complaint and subsequently moved for summary judgment dismissing Conrail's crossclaim against CJI for indemnification. The District Court found that there were no material facts in dispute, but denied both motions for the reasons stated in a written Opinion of December 28, 1987 (App. 20a) and entered a single Order denying the motions and certifying the following question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b):

> Whether Congress intended in § 77 of the Bankruptcy Act and the Regional Rail Reorganization Act (Rail Act), as amended, or other law, that Consolidated Rail Corporation or the transferors reorganized under the Rail Act, or both, would succeed to the responsibility for FELA claims that were unmatured at the time of the conveyances; and whether the nature of the reorganization of The Central Railroad Company of New Jersey precludes any liability on behalf of CJI Industries, Inc. on such claims.

The Third Circuit granted the Petition of CJI for permission to appeal, and on July 19, 1988 issued an Opinion (App. 1a) and entered judgment (App. 16a) affirming the District Court's decision denying CJI's Motions for Summary Judgment. CJI petitioned for rehearing, which was denied on August 11, 1988. (App. 18a).

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REASONS FOR GRANTING THE PETITION

1. The decision of the Third Circuit below is in conflict with this Court's decision in Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974). This Court held the Rail Act constitutional as a reorganization statute, enacted under the bankruptcy power, and recognized that Conrail was the reorganized company.

> "[W]e believe that there is nothing in the [Rail] Act fundamentally at odds with the expressed purpose of Congress to supplement the reorganization laws, see H Rep 29 and, with the Tucker Act, the Rail Act is valid as a reorganization statute." 419 U.S. at 150.[1]
>
> * * *
>
> "Congress . . . clearly intended to legislate pursuant to the bankruptcy power. The Rail Act, like § 77 of the Bankruptcy Act, which the Rail Act supplements, merely 'advances another step in the direction of liberalizing the law on the subject of bankruptcies' . . ." 419 U.S. at 153.
>
> * * *
>
> "[S]ince the Rail Act does not on its face exceed the broad scope of congressional power under the Bankruptcy Clause, Congress has not formulated an unconstitutional reorganization plan in compelling a reorganization wherein the compensation to appellees consists of Conrail and USRA securities and other bene-

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[1] § 101(b) of the Rail Act, 45 U.S.C. § 701(b), sets forth the Congressional purpose for the Act. The second enumerated purpose is:

> "The *reorganization of railroads* in this region into an economically viable system capable of providing adequate and efficient rail service to the region" (Emphasis provided).

> fits 'so long as the creditor gets all the value of his lien and his share of any free assets.' This Act does differ from other reorganization statutes such as § 77, however, in that it requires a conveyance before it is possible to ascertain whether this last condition will be met. Thus, the conveyance is mandated without any prior judicial finding that there will be adequate resources in *the reorganized company* of whatever kind to compensate the debtor estates and, eventually, their creditors." 419 U.S. at 154-55. (emphasis added). other cites omitted).

The Rail Act was designed to supplement Section 77 to provide a means of reorganizing a number of insolvent rail carriers into a new for profit railroad, Conrail. *Regional Rail Reorganization Act Cases,* 419 U.S. at 109. Congress realized that existing bankruptcy statutes were inadequate to deal with multiple rail bankruptcies. 1975 *U.S. Code Cong. & Ad. News,* 36. A Special Court was created and its powers were to "include those of a *reorganization court.*" Rail Act § 209(b), 45 U.S.C. § 719(b) (emphasis added). The district courts having jurisdiction over the separate railroads in reorganization under § 77 had to decide whether to continue the present § 77 reorganizations or proceed by "reorganization under this chapter [the Rail Act]." Rail Act § 207(b)(1), 45 U.S.C. § 717 (b)(1). See *Regional Rail Reorganization Act Cases,* 419 U.S. at 110; *In re Penn Central Transportation Co.,* 384 F. Supp. 895, 951 n.115 (Regional Rail Reorg. Ct. 1974).

Congress intended Conrail to be the reorganized railroad company emerging from this super reorganization proceeding. Rail Act § 206(a)(1) 45 U.S.C. § 716(a)(1), provided:

> "The Final System Plan shall be formulated in such a way as effectuate the following goals:
>
> (1) the creation, *through a process of reorganization,* of a financially self-sustaining rail and express service system in the region." (emphasis added).

A new agency, United States Railway Association ("USRA"), was created to fulfill the traditional function of the Interstate Commerce Commission in the formulation of plans of railroad reorganization (Bankruptcy Act § 77(d)); and provisions were made for a Preliminary and Final System Plan to substitute for the normal Plan of Reorganization. *Regional Rail Reorganization Act Cases,* 419 U.S. at 111; Rail Act §§ 201-09, 45 U.S.C. §§ 711-19. In the Preliminary System Plan, Vol. I, at p. ii, USRA described its Conrail Reorganization Plan:

> "The Regional Rail Reorganization Act of 1973 is what its name specifically implies. . . [T]he purposes of the Act are considerably broader than those of previous bankruptcy statutes. A basic goal of the Act is to take the several bankrupt railroads . . . and reorganizing and consolidating their essential rail properties into a financially self-sustaining rail company. In turn, securities of the new company and other benefits are to be provided to creditors of the bankrupt railroads, in exchange for those rail properties designated for use in continued rail service under the Reorganization Plan. A successful reorganization requires creation of an on-going rail company with earning ability (combined with other benefits available under the Act) sufficient to underwrite the securities of the new company and hence to compensate the creditors adequately for properties transferred to the planned system."

In the Final System Plan, USRA stated:

> "The purpose of the Rail Act is to provide for an income-based reorganization of assets held in the bankrupt estates, a reorganization which will result in the emergence of a viable new rail entity, Conrail." Final System Plan, vol. 1 at 137.

The Third Circuit's decision in *Schweitzer* imposes liability for inchoate claims on the reorganized company. However, in its decision below the Third Circuit improperly ignored *Regional Rail Reorganization Act Cases* and its implications as to the identity of the reorganized company. The Third Circuit found CJI liable for inchoate claims arising out of CNJ exposures because it found no specific Rail Act provision transferring such liabilities to Conrail. 852 F.2d at 77. The Court made the wrong inquiry; it should have focused on the absence of any provision in the Rail Act relieving Conrail from such liability or providing Conrail a right of indemnification from CJI. This Court's analysis in deciding whether a Tucker Act remedy existed under the Rail Act is equally applicable here. In *Regional Reorganization Rail Act Cases*, 419 U.S. at 126, this Court stated:

> "The District Court made the wrong inquiry. The question is not whether the Rail Act expresses an affirmative showing of Congressional intent to permit recourse to a Tucker Act remedy. Rather, it is whether Congress has in the Rail Act *withdrawn* the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the Rail Act "founded . . . upon the Constitution." For we agree with the Special Court that 'the true issue is whether there is sufficient proof that Congress intended to *prevent* such recourse. The [Rail] Act being admittedly silent on the point, the issue becomes whether the scheme of

> the [Rail] Act, supplemented by the legislative history, sufficiently evidences a Congressional intention to withdraw a remedy that would otherwise exist.' 384 F. Supp. at 942."

The intent of Congress in enacting the Rail Act under the bankruptcy power, creating a super reorganization proceeding and creating Conrail as the new reorganized railroad emerging from those proceedings, has necessary implications overlooked by the Third Circuit. In particular, inchoate claims, to the extent they survive the reorganization, may be asserted against the reorganized company, Conrail, and Conrail has no right to indemnification from CJI. This result would follow as a matter of reorganization law unless there was a contrary provision in the reorganization statute withdrawing from Conrail that liability which would otherwise exist.

We have found no such provision in the Rail Act insulating Conrail from such liability. Moreover, in *Consolidated Rail Corp. v. Reading Co.*, 654 F. Supp. 1318, 1322-23 (Regional Rail Reorg. Ct. 1987) the Special Court held that Rail Act § 709(b), 45 U.S.C. § 797h(b), does not insulate Conrail from such inchoate claims. The Special Court stated:

> "The principal problem with Conrail's argument is that there is just no indication that Congress regarded the possibility of successor tort liability to be an obstacle to Conrail's continued operations. . . . In sum, we are asked to find preemption on the basis of Conrail's speculation about the danger of an 'unpredictable but large influx of liability claims' . . . a danger that Congress never saw fit to mention." 654 F. Supp. at 1332.
>
> "Ultimately Conrail's financial burden argument proves too much, as it would logically mandate the

preemption of all state laws that add costs to the operation of the railroad. Conrail's contentions regarding 'pervasive regulation' and 'dominant interest' are unconvincing; so too is its 'frustration of federal purpose' argument." 654 F. Supp. at 1333.

While we are aware of no Rail Act provision insulating Conrail from liability for inchoate claims, Rail Act § 601(b)(4), 45 U.S.C. § 791(b)(4), strongly suggests that Congress did not intend for the estates of the former railroads to be responsible for such claims. That section authorizes the respective Reorganization Courts:

". . . to reorganize or liquidate such railroad in reorganization pursuant to such Section 77 on such terms as the Court deems just and reasonable, or pursuant to any other provisions of the Bankruptcy Act, if the Court finds that such action would be in the best interests of such estate."[2]

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[2] The Court below expressed the view that CJI's present position was inconsistent with its position in *In re Reading Co.*, 838 F.2d 686 (3d Cir. 1988) *cert. den.* 108 S. Ct. 2825, its self description in SEC filings and its tax use of CNJ net operating losses (NOL). 852 F.2d at 78. CNJ exercised the right extended to it under 601(b)(4) of the Rail Act to reorganize under § 77. Under § 77(b)(5) it was of no consequence whether CJI used CNJ's corporate charter or a new charter. The anti-setoff principles generally applicable in § 77 reorganizations apply to the CNJ Plan of Reorganization. CNJ reorganized into two companies. Its rail assets and business were reorganized into Conrail; and its non-rail assets were reorganized into CJI. CJI is a reorganized company just as Conrail is, and we have never claimed otherwise; but this does not resolve CJI's liability here to Plaintiff or to Conrail on its indemnification claim. Moreover, I.R.C. § 374 generally treats Conrail as the reorganized company: gain or loss was not recognized on the transfer of rail assets

(Continued on following page)

Thus, Congress contemplated that the estates of the former railroads might simply liquidate, leaving no visible target for plaintiffs to pursue on their inchoate claims or for Conrail to pursue on any alleged indemnification claim. Congress' concern for rail labor, in general, and FELA claimants, in particular is well known; and it would be unrealistic to presume that Congress would ever intend to leave such claimants without an effective remedy. The explanation must be found in Congress' confidence that Conrail, as the reorganized company, would respond to the inchoate claims.

Although the Third Circuit below gave no effect to *Regional Rail Reorganization Cases* holding that the Rail Act was a reorganization statute and its proper implication that Conrail, as the reorganized company, was liable unless the Rail Act withdrew that liability which would otherwise exist; the Court gave great effect to its misunderstanding of the Rail Act's compensation formula. The Rail Act provided that the estates of the transferor railroads would receive securities reflecting the constitutional minimum total of the net liquidation value (NLV) of the assets transferred, plus damages for compensable unconstitutional erosion (CUE), reduced by the value of other benefits (VOB) derived from reorganization under the Rail Act. Rail Act § 306(c)(4), 45 U.S.C. § 746(c)(4),

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(Continued from previous page)

to Conrail; and Conrail obtained the advantage, for depreciation and other tax purposes, of a carryover basis, which was generally higher than market value, for the transferred assets. 1976 *U.S. Code Cong. & Ad. News*, 480. I.R.C. § 374(c)(4) specifically denied the NOL's to Conrail, which otherwise may have carried over, because Conrail did not need or want them. *Id.*

In re Valuation Proceedings Under §§303(c) and 306 of Regional Rail Reorganization Act, 425 F. Supp. 266, at 276-77 (Regional Rail Reorg. Ct. 1976). See *Regional Rail Reorganization Act Cases,* 419 U.S. at 111, 118-19, 148. The Court below mistakenly believed that the compensation received by CJI had not been reduced by an allowance for the inchoate claims, and that to relieve CJI of such obligations would skew the compensation formula, and provide CJI more than the constitutional minimum intended by Congress. 852 F.2d at 77. In fact, CJI received, in trust for CNJ creditors,[3] the NLV, as determined by the Special Court, of $40,874,734, plus interest, without increase for CUE or reduction for VOB. CJI had agreed to drop its large claim for compensable unconstitutional erosion (CUE), discussed in *In re Valuation Proceedings Under Sections 303(c) and 306 of Regional Rail Reorganization Act,* 439 F.Supp. 1351 (Regional Rail Reorg. Ct. 1977), in exchange for USRA's waiver of its claim to reduce the amount of the recovery by the value of other benefits derived by CNJ from the Act (VOB). USRA had contended that relief from "inchoate obligations" was one such benefit.[4] *In re Valuation Proceedings Under Sec-*

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[3] CJI did not own the valuation claim. It simply held it in trust and prosecuted it for the benefit of CNJ's former creditors and shareholders. When the certificates of value were received, they were delivered to Manufacturers Hanover which thereafter, upon redemption, distributed the $91+ million to the former creditors as their interests appeared. It is unclear from the Court's opinion as to whether it believes that CJI benefited from the valuation proceeds paid for CNJ's rail assets.

[4] In the Final System Plan, at page 128, an "other benefit" is defined as "any consequence of the Act, in addition to the provision of Conrail securities and the condition of a rail estate as compared with its position in the absence of the Act."

tions 303(c) and 306 of Regional Rail Reorganization Act of 1973, 445 F. Supp. 994, 1042-44 (Regional Rail Reorg. Ct. 1977). The type of asbestos claim asserted in this action was inchoate at the time of the conveyances; and had the matter not been otherwise disposed of, one can only assume that USRA would have argued for a reduction in the amount of the certificates of value to reflect relief from such inchoate claims.

Application of the Third Circuit's reasoning on a principled basis to the true circumstances leads to the following conclusions: (i) the Third Circuit's opinion deprives CJI of its minimal constitutional entitlement under the Rail Act because it vitiates a part of the consideration CJI was entitled to receive (*i.e.*, the relief from the inchoate obligations portion of VOB) in exchange for the surrender of its claim for compensable unconstitutional erosion (CUE); and (ii) the Third Circuit's opinion is therefore contrary to the pertinent Congressional intent.

2. This case presents important questions of federal law which should be decided by this Court. The Third Circuit's decision below imposes FELA liability upon a company which was not a railroad at the time the FELA injury occurred, within the meaning of *Schweitzer v. Consolidated Rail Corporation*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).

The Third Circuit is in error for three reasons. First, the language of the FELA does not tolerate the construction employed. Second, regardless of whether Conrail or CJI or both should be regarded as the reorganized CNJ under the Rail Act, Conrail should be treated as the successor to CNJ under the FELA. Third, the ruling is totally

inconsistent with the holding of the Third Circuit in *Schweitzer*—which should either be followed or overruled, but not selectively ignored.

The Third Circuit's Opinion in *Schweitzer*, fairly read, holds that the "late blooming" claimants, such as Plaintiff Zulkowski, did not suffer injury sufficient to create a claim until after the consummation of the reorganization plans involved. At the time Plaintiff's FELA cause of action first came into existence under *Schweitzer*, neither CNJ nor CJI was a railroad. CNJ ceased to be a common carrier on April 1, 1976 when it transferred its rail business to Conrail. CJI was never a railroad. Plaintiff Zulkowski presumably first suffered injury many years later in the 1980's.

Liability on the part of CJI can only be found by torturing the language of the FELA beyond reasonable construction in order to serve the broad remedial purposes of the statute. FELA § 1, 45 U.S.C. § 51, provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce. . . ."

In its decision below, the Third Circuit read this Section "as being applicable if *at the time of the exposure leading to the injury* the defendant was a railroad engaging in commerce and the plaintiff was its employee." 852 F.2d at 77, n. 7. The Third Circuit's rationalization of this sweeping statutory construction on the grounds that a new non-railroad company is somehow "responsible" for CNJ's negligence and FELA obligations begs the ques-

tion. Neither CJI nor CNJ was a railroad when the FELA claim came into existence. Conrail, and not CJI, stepped into CNJ's "shoes" and took over CNJ's common carrier status in April of 1976. To the extent the Court considers it appropriate to expand the language of the statute to serve its broad remedial purpose, it will do less violence to the controlling statutory language by holding Conrail liable as the successor to CNJ's common carrier status and as the actual employer of plaintiff Zulkowski after April 1, 1976.

The notion that holding CJI liable "places the loss on the party responsible for it" (852 F.2d at 77, n. 7) is pure fiction and inconsistent with the policy of former Section 77 to give the reorganized company a "fresh start". Conrail, and not CJI, is the continuing railroad of CNJ. The rail assets, rail business, and rail employees of CNJ that caused the exposures of which plaintiffs complain are Conrail's assets, business and employees—and not CJI's. The shareholders, officers, directors and creditors of CNJ totally differ from those of CJI; not a single CNJ employee is employed by CJI; and no one at CJI knows anything about plaintiffs or their claims. Conrail stands in CNJ's rail carrier "shoes" and has taken over its rail carrier responsibilities. It is the "common carrier" to which plaintiffs should look in pursuing their FELA claims. This imposition of FELA liability on the continuing "common carrier" is consistent with ICC regulation providing for the continuing operations of common carrers. Prior to the Rail Act, withdrawals of railroads from operations were all governed by §§ 1(18)-(20) of the Interstate Commerce Act, 49 U.S.C. § 10903; and Congress,

in enacting and amending the FELA, was certainly aware of the general practice of the ICC to impose, as a condition of any withdrawal, the takeover by a successor carrier of the former carrier's rail obligations.

Finally, the Court's opinion is directly contrary to its analysis in *Schweitzer*, where it held that exposures giving rise to sub-clinical injuries do not rise to the dignity of "claims", which include "interests of whatever character". If *Schweitzer* is good law, there can be no reasoned basis to find that plaintiffs ever had a FELA claim against CNJ or that the liability for any such claim ever passed to CJT because, when plaintiffs' claims arose, they were not employees of CNJ and CNJ was not a rail carrier.

There are substantial grounds to consider the overruling of *Schweitzer*. Its weaknesses have been persuasively noted elsewhere. Circuit Judge Robert B. Krupansky, who presided over the Erie Lackawanna Reorganization prior to his elevation to the Sixth Circuit and who continued to do so by designation, expressly declined to follow *Schweitzer*, and held that Erie's discharge under § 77 was an absolute bar to such claims. On appeal, the Sixth Circuit affirmed on different grounds, holding there was no need to address the issue decided by the Third Circuit in *Schweitzer* (803 F.2d at 882, n.1) because, in any event, such claims could not be asserted against the new Erie Lackawanna company. *In re Erie Lackawanna Railway Co.*, No. B72-2838 (N.D. Ohio, June 18, 1985), (App. *infra* 43a), *aff'd on other grounds*, 803 F.2d 881 (6th Cir. 1986), *cert. den.* 107 S. Ct. 2463 (1987). The constitutional concerns that led to *Schweitzer's* result are fully answered by *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.

306, 317-18 (1950). The long term effect of the opinion is to dramatically limit, at least in the Third Circuit, the significance of a bankruptcy discharge and the policy of repose. But if *Schweitzer* is not to be overruled, then justice requires that it be applied in an even-handed manner. The even-handed application of its principle to the present circumstances requires a determination that plaintiffs have no FELA claims against CJI.

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CONCLUSION

There are special and important reasons for granting this Petition. The Rail Act and FELA issues presented here are potentially dispositive of a large number of present and future cases. CNJ's employees were only a small fraction of the numbers employed by the other transferor railroads; yet more than 70 asbestos FELA actions have been brought against CJI, and CJI has been notified by claimants' attorneys of more than 60 hearing loss claims under investigation. Many such claims have been brought against the other transferors. Similar "late blooming" claims have been brought under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. The Rail Act issue presented here is certain to arise in environmental cleanup and other types of cases where inchoate claims can occur. Judicial torture of the language of the FELA threatens to invite new and novel claims under the FELA against non-carriers in a variety of contexts.

The Petition for a Writ of Certiorari should be granted to correct the Third Circuit's disregard of the

holding of *Regional Rail Reorganization Act Cases* and the controlling language of the FELA.

Dated: October 17, 1988

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5172

STANLEY ZULKOWSKI, SR.
& CLARA RUTH ZULKOWSKI

v.

CONSOLIDATED RAIL CORP.,
GARLOCK, INC.,
CERTAIN-TEED CORPORATION,
RAYMARK INDUSTRIES, INC., a/k/a
RAYBESTOS-MANHATTAN, INC.,
THE CELOTEX CORP.,
ARMSTRONG WORLD INDUSTRIES
and
CENTRAL JERSEY INDUSTRIES, INC.

Central Jersey Industries, Inc.,
Appellant

On Appeal from the United States
District Court
for the District of New Jersey
(D.C. Civ. No. 86-4870)

Argued June 9, 1988
BEFORE: BECKER, STAPLETON,
and GREENBERG, *Circuit Judges*
(Filed July 19, 1988)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

On this appeal we determine whether a former railroad is absolved of liability from a claim by a former employee under the Federal Employers' Liability Act (FELA) for asbestosis becoming manifest subsequent to the reorganization of the railroad pursuant to section 77 of the Bankruptcy Act of 1898, as supplemented by the Regional Rail Reorganization Act of 1973 (Rail Act), and after the divestment of its rail assets by their conveyance of the Consolidated Rail Corporation (Conrail). We hold that it is not shielded from these claims.[1]

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1. The facts are not in dispute and thus as this appeal involves only the application of legal precepts our review is plenary. *United States v. Adams,* 759 F.2d 1099, 1106 (3d Cir.), *cert. denied,* 474 U.S. 906, 971, 106 S.Ct. 275, 336 (1985).

I.

Plaintiff, Stanley Zulkowski, was employed by the Central Railroad Company of New Jersey (CNJ) from 1962 until 1976. Because of financial distress, CNJ was in reorganization from 1967 until 1979. In response to a major railroad financial crisis, leading to reorganization proceedings for several railroads, in 1973 Congress enacted the Rail Act, 45 U.S.C. §§ 701-797. The Act recited that it was passed since "essential rail service [was] threatened with cessation or significant curtailment because of the inability of the trustees of such railroads to formulate acceptable plans of reorganization" and since "[t]he public convenience and necessity require adequate and efficient rail service . . . to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers." 45 U.S.C. § 701(a)(2)(3). The Rail Act provided for the creation of Conrail and the conveyance to it of the rail assets held by railroads in reorganization. 45 U.S.C. §§ 741, 743.[2] Accordingly, the rail assets of CNJ were conveyed to Conrail in 1976 with final values for the assets to be determined in statutory valuation proceedings. *See In re Reading Co.*, 838 F.2d 686, 687 (3d Cir.), *cert. denied*, 56 U.S.L.W. 3848 (U.S. June 13, 1988) (No. 87-1793); *In re Cent. R.R. Co. of N.J.*, 579 F.2d 804, 806-07 (3d Cir.

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2. The Rail Act was amended by acts including the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976) (codified as amended at 45 U.S.C. §§ 801-855 (1982)) and the Northeast Rail Service Act of 1981, Pub. L. No. 97-35, 95 Stat. 643 (1981) (codified as amended at 45 U.S.C. §§ 1101-1116 (1982)).

1978). At that time Mr. Zulkowski became an employee of Conrail and he continued that employment until his retirement in 1979.

CNJ, which had been incorporated under a special act of the New Jersey Legislature, remained in reorganization until September 14, 1979, the "consummation date," when it filed a restated and amended certificate of incorporation under N.J. Stat. Ann. § 14A:1-4 (West 1969) providing for a change of its name to Central Jersey Industries, Inc.[3] *See also In re Cent. R.R. Co. of N.J.*, 473 F.Supp. 225 (D.N.J. 1979). It was later renamed CJI Industries, Inc. and will therefore be referred to as CJI in this opinion. Under the plan of reorganization the secured creditors of CNJ became the shareholders of CJI. Except for the rail assets previously conveyed to Conrail, the assets of CNJ, including cash, real estate, investments, leases and certificates from the United States Railway Association guaranteeing payment for the CNJ rail assets conveyed to Conrail, remained the property of CJI after the consummation date. In addition, CJI retained substantial income tax loss carryforwards from CNJ's discontinued rail operations. Though no longer a railroad, CJI has continued in business and is a substantial entity. Its net income was over $5.8 million in 1985 and its stock is listed on the Philadelphia Stock Exchange.

Mr. Zulkowski and his wife, Clara Ruth Zulkowski, brought this FELA action on December 9, 1986 against Conrail and CJI as a result of his asbestosis which, though

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3. The certificate was actually filed on behalf of CNJ by its trustee.

allegedly traceable to asbestos exposure during his employment with CNJ, was not manifested until after the consummation date.[4] CJI moved for summary judgment against the complaint and against all crossclaims on the ground that it is not the legal successor to CNJ. It later specifically moved for summary judgment on Conrail's cross-claim for indemnification on the ground that Conrail was the successor to CNJ.

The district judge, in ruling on the motions, noted that the thrust of CJI's position was that as a result of the reorganization CNJ's rail liabilities passed to Conrail. Thus, the judge perceived the issue before him to be "whether Congress intended in section 77 of the Bankruptcy Act and the Rail Act to pass the debtor's non-discharged rail obligations to Conrail." He answered this question in the negative, relying on this court's decision in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864, 106 S.Ct. 183 (1985), as well as the bankruptcy court's decision on remand from this court in *Schweitzer v. Consolidated Rail Corp.*, 65 Bankr. 794 (Bankr. E.D.Pa. 1986). The judge reasoned that the effect of the reorganization was to discharge existing claims but not to shield CJI, as the reorganized company, from future claims which might relate to earlier activities. He also indicated that an examination of 45 U.S.C. § 797h and 45 U.S.C. § 721(h)(1)(A) suggested that Congress intended to absolve railroads from claims for certain personal injuries or death which existed at the time of reorganization but not claims which did not yet

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4. There are other defendants who allegedly manufactured asbestos but they are not involved in this appeal.

exist at that time. Thus, the judge denied CJI's motions for summary judgment. A single order was entered on February 11, 1988 on both motions.

II.

This court has jurisdiction pursuant to 28 U.S.C. § 1292(b). The district court certified the following question of law:

> Whether Congress intended in § 77 of the Bankruptcy Act, and the Regional Rail Reorganization Act (Rail Act), as amended, or other law that Consolidated Rail Corporation or the transferors reorganized under the Rail Act, or both, would succeed to the responsibility for FELA claims that were unmatured at the time of the conveyances; and whether the nature of the reorganization of The Central Railroad Company of New Jersey precludes any liability on behalf of CJI Industries, Inc. on such claims.

While we have granted permission to appeal, the question certified is broader than the issue resolved in the district court. Though the judge in considering CJI's motions did discuss Conrail's possible liabiliy, he did so in the context of considering the liability of CJI. Thus, the precise matter before the district court on CJI's motions for summary judgment was not Conrail's responsibility for the Zulkowskis' claims. Rather, it was whether CJI could be liable. This distinction is critical as our jurisdiction is limited to a review of the order of the district court. Thus, though we acknowledge that, like the district court, we will make some reference to the potential liabiliy of Conrail, inasmuch as the order of the district court did not determine whether Conrail could be liable for the Zulkowskis' claims

neither will we. Accordingly, our opinion only passes on the possible liability of CJI. *Miller v. Bolger,* 802 F.2d 660, 666-67 (3d Cir. 1986). *See In re Data Access Sys. Sec. Litig.,* 843 F.2d 1537, 1550-51 (3d Cir. 1988); *Link v. Mercedes-Benz of N. Am., Inc.,* 550 F.2d 860, 863 (3d Cir.) (in banc), *cert. denied,* 431 U.S. 933, 97 S.Ct. 2641 (1977) ("[O]ur jurisdiction extends only to orders of the district court. These orders must be definitive, effective, and in a posture capable of affirmance or reversal.").

III.

CJI asserts that it is released from liability to the Zulkowskis in accordance with Congressional intent implicit in the Rail Act with respect to latent asbestosis claims. Inasmuch as the Rail Act supplements section 77 of the Bankruptcy Act of 1898, 11 U.S.C. § 205 (repealed 1978), we first consider the effect of section 77 in this case.[5] *See Blanchette v. Connecticut Gen. Ins. Corps.,* 419 U.S. 102, 109, 95 S.Ct. 335, 342 (1974). Section 77(b) of the Bankruptcy Act provided that plans of reorganization "shall include provisions modifying or altering the rights of creditors. . . ." 11 U.S.C. § 205(b) (repealed 1978). Creditors include "all holders of claims of whatever character against the debtor or its property, whether or not such claims would constitute provable claims under [the Act]. . . ." *Ibid.* Claims include "debts, whether liqui-

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5. The Bankruptcy Code superseded the Bankruptcy Act on October 11, 1979. CJI began its reorganization proceedings in March 1967. As a result, the Bankruptcy Act will apply in this case. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, tit. IV, § 403(a), 92 Stat. 2549, 2683 (1978). *See also In re Penn Cent. Transp. Co.,* 831 F.2d 1221, 1222 n. 1 (3d Cir. 1987).

dated or unliquidated . . . or other interests of whatever character." *Ibid.*

In *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, former employees of CJI and another reorganized railroad, The Reading Company, brought FELA actions against the reorganized companies for injuries manifested after the reorganizations but allegedly caused by exposure to asbestos before the reorganizations. The reorganized companies argued that the actions were barred by the discharges in their bankruptcy proceedings. *Id.* at 940.

In our analysis, we acknowledged that a tort action is a "claim" under section 77. 758 F.2d at 941. We recognized, however, that generally a tort action does not exist until a party suffers an identifiable, compensable injury. *Id.* at 942. Thus, we held that a subclinical injury from asbestos exposure is an insufficient basis on which to maintain a tort action as a party does not suffer an actual loss or damage from such an injury. *Ibid.* Accordingly, we held that manifest injury is a prerequisite for an FELA action for an asbestos-related injury. Inasmuch as the employees in *Schweitzer* did not have manifest injuries prior to the reorganization, their claims could not have been discharged under section 77. *See id.* at 944. It follows from *Schweitzer* that the Zulkowskis' claims were not discharged simply because CNJ went through reorganization.

But *Schweitzer* does not entirely resolve the issue before us for it is one thing to conclude that a claim has survived but another to identify the entity responsible for it. CJI asserts "the entire focus of the Rail Act is upon the creation of Conrail as the reorganized company." Thus,

in its view, the liability for any claim which the Zulkowskis could have made against CNJ has passed to Conrail. In support of this position, CJI cites to portions of the Rail Act and subsequent legislative history. *E.g.*, 45 U.S.C. § 701(b)(2) (a purpose of Rail Act is "reorganization of railroads . . . into an economically viable system. . . ."); 45 U.S.C. § 719(b) (creation of special court); 45 U.S.C. § 743 (conveyances of rail properties to Conrail); 45 U.S.C. § 791(b)(4) (reorganization courts should proceed justly, reasonably and in the best interests of the estate to reorganize or liquidate railroads in reorganization); H.R. Rep. No. 7, 94th Cong., 1st Sess. 4, *reprinted in* 1975 U.S. Code Cong. & Admin. News 35, 36 (the Rail Act "was designed to . . . provide a means of reorganizing a number of rail carriers in the region into a profitable system.").

But nowhere in these citations, or elsewhere in the Rail Act, is there any provision transferring the liability for a claim of the type made here from an entity reorganized under the Act to Conrail or otherwise relieving an entity so reorganized from such a liability. In the absence of any such provision, we will hold consistently with *Schweitzer* that the liability will remain with CJI if the Zulkowskis' claim proves to be meritorious.

We also point out CJI's position cannot be reconciled with the actual application of the Act. CJI received certificates of value in the principal amount of $40,874,734 for the assets conveyed which were later redeemed for $91,786,087, the principal plus interest of $50,911,353. In return, the rail assets were conveyed to Conrail free and clear of any liens or encumbrances. 45 U.S.C. § 743(b)(2).

CJI does not suggest that it received an amount reduced from the value which would have otherwise been fixed for its rail assets because of the estimated value of the latent asbestosis claims, nor is there any indication that the allocation of rail assets to Conrail contemplated the transfer of liability for the latent asbestosis claims. Thus, the obligations represented by the certificates of value did not reflect a transfer of liability and the valuation proceeding will be skewed in CJI's favor if it is relieved of liability for these claims.[6] Relieving it of this liability would effectively give CJI an additional consideration and thus would be contrary to Congressional intent as CJI would be receiving more than the minimum compensation required by the Constitution which is what it was to receive under the Rail Act. *See Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. at 148, 95 S.Ct. at 361.

While we decide this case on the basis of the application of section 77 and the Rail Act, we note that general corporation law is consistent with our result. CNJ did not become a new entity by amending its certificate of incorporation. 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 7329 (rev. perm. ed. 1983). Thus, notwithstanding the name change, the liabilities of CNJ which survived the reorganization are the liabilities of CJI. *See Polius v. Clark Equip. Co.*, 802 F.2d 75, 77 (3d Cir. 1986); *Knapp v. North Am. Rockwell Corp.*, 506 F.2d 361, 364 (3d Cir. 1974), *cert. denied*, 421 U.S. 965, 95 S.Ct.

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6. This potential liability for asbestosis claims, could be quite substantial. According to the Zulkowskis' brief this action "is one of approximately 48 actions pending under . . . FELA naming . . . CJI and Conrail" filed in federal and state courts in Pennsylvania and New Jersey.

1955 (1975). *See also Gee v. Tenneco, Inc.*, 615 F.2d 857, 862 (9th Cir. 1980) ("We are aware of no rule of law which allows a corporate entity to evade liability for its tortious conduct merely by selling the . . . instrumentality which is alleged to have caused the injury. . . ."). Indeed, the New Jersey statute under which CNJ filed its amended certificate of incorporation provides that "[n]othing in this section shall be held to affect such transactions, liabilities or debts of any such corporations, occurring before the filing of such certificate." N.J. Stat. Ann. § 14A:1-4 (West 1969). Further, CJI is not a new corporation with new outside shareholders. Rather, its shareholders had been secured creditors of CNJ. Overall, therefore, our result is consistent with general corporation law.[7]

It should not be overlooked that in other contexts CJI has acknowledged that it is the successor to CNJ. Following the consummation date, in a notice to its stockholders of a special meeting for December 13, 1979, CJI stated that it was "the successor through reorganization under § 77 of the federal bankruptcy laws of The Central

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7. We also reject CJI's claim that it is insulated from liability in this case since it is not currently a "common carrier by railroad . . . engaging in commerce" and Mr. Zulkowski is not "employed by such carrier" as required by the FELA. 45 U.S.C. § 51. We read this section as being applicable if *at the time of the exposure leading to the injury* the defendant was a railroad engaging in commerce and the plaintiff was its employee. Our construction of 45 U.S.C. § 51 places the loss on the party responsible for it. *See Urie v. Thompson*, 337 U.S. 163, 187, 69 S.Ct. 1018, 1033 (1949) ("We do not think the mere difference in the time required for different acts of negligence to take effect and disclose their harmful, disabling consequences would justify excluding [a latent disease] from the Act's coverage . . . ."). *See also Schweitzer v. Consolidated Rail Corp.*, 65 Bankr. at 805-07.

Railroad of New Jersey." The notice also read in part: "Since the consummation of the plan, the Company has continued to manage its retained assets. . . ." Further, in a discussion of its net operating loss carryforwards the financial statement appended to the notice indicated that "Central Jersey Industries, under its former name of Central Railroad Company of New Jersey" filed certain tax returns. Clearly, by claiming the loss carryforwards CJI benefitted from CNJ's railroad losses at a time when CJI was engaged solely in other businesses. In the circumstances, we have difficulty understanding how CJI can now suggest that it should not be regarded as the successor to CNJ.

We also point out that CJI's position is inconsistent with the contentions it advanced in *In re Reading Co.*, 838 F.2d 686. There it contended that the Reading Company, which reorganized under section 77, should not be allowed to set off the notes it received for its unsecured claims against CNJ in the latter's reorganization against claims which CJI held against Reading even though set offs are routinely allowed in ordinary bankruptcy cases. The claim of set off was significant as it appeared that the notes issued by CNJ would not be paid but that CJI's claim against Reading would be honored. The district court allowed the set off and required Reading to issue notes for only the amount of its obligation in excess of the notes issued in the CNJ reorganization. We reversed that order as we treated the rules against set offs as applicable even though both CJI and Reading were no longer ongoing railroads. It is apparent from Reading that CJI was relying on principles of railroad reorganization when it was in its

interest to do so. Thus it demonstrated its continuity with CNJ. We accepted that continuity of structure there and we do so again.

IV.

CJI argues, relying on *In re Erie Lackawanna Ry. Co.*, 803 F.2d 881 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 2463 (1987), that CNJ's reorganization should be considered a liquidation, and thus it cannot be held liable in this case. In *Erie Lackawanna*, former Erie Lackawanna (Erie) employees brought asbestos-related personal injury actions against Erie. Like CJI, Erie had previously reorganized under the Bankruptcy Act. *Id.* at 882. The employees' injuries did not become manifest until after the consummation of the reorganization. Nevertheless prosecution of the employees' actions was enjoined by the district court which held those claims against Erie had been discharged in the reorganization. The court of appeals considered that the issue before it was whether Erie's restructuring under section 77 and the Rail Act was a reorganization or a liquidation for if it was a liquidation there would be no company left against which the action could be brought. 803 F.2d at 883.

The court noted that Erie's board of directors chose not to liquidate the company immediately. *Id.* at 884. Nevertheless, the court held that the reorganization was a liquidation as Erie was not to be preserved as a going concern. *Ibid.* Accordingly, the judgment of the district court was affirmed.

Erie Lackawanna is clearly distinguishable from this case. The plan there called for a liquidation "as expedi-

tiously as practicable," and was characterized by the district court as a "liquidating plan of reorganization." *Id.* at 882-83. Here CNJ's plan contemplated a corporation which would continue and prosper—as it has. As the district court in our case noted, Erie's "restructuring was not designed to create a new, reorganized company which would continue in existence for the long term." Thus, *Erie Lackawanna* is not contrary to our result.[8]

V

We find no basis why CJI should be relieved of liability by operation of either statutory or case law. Accordingly, the order of the district court will be affirmed.

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8. Judge Becker does not agree that *Erie Lackawanna* is distinguishable. He notes that in both cases the bankruptcy proceeding was conducted under the statutory framework—section 77 of the Bankruptcy Act, which *"only* deals with reorganization." *Erie Lackawanna*, 803 F.2d at 884 (emphasis in original). Moreover, he believes that the cases are not distinguishable in terms of the "underlying realities" of the case. *See ibid.* He notes in this regard that in both cases the majority of the railroad's assets, including substantially all rail assets, were transferred to Conrail and the debtor's primary previous business ceased to exist. Although Erie's plan called for expeditious liquidation, it included a provision by which the creditors of the reorganized company could elect to continue it as an operating company. Indeed, in 1983 the Erie board of directors recommended continued existence, and although the shareholder's vote on the recommendation was deferred, at the time *Erie Lackawanna* was decided there was no assurance that the liquidation would actually take place. Thus the ultimate disposition of Erie does not strike Judge Becker as significantly different from that of CJI.

Judge Becker agrees with the result that the majority reaches in Part IV, however, because he believes that *Erie Lackawanna* was wrongly decided for the reasons set forth in the other portion of this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5172

STANLEY ZULKOWSKI, SR.
& CLARA RUTH ZULKOWSKI

v.

CONSOLIDATED RAIL CORP.,
GARLOCK, INC.,
CERTAIN-TEED CORPORATION,
RAYMARK INDUSTRIES, INC., a/k/a
RAYBESTOS-MANHATTAN, INC.,
THE CELOTEX CORP.,
ARMSTRONG WORLD INDUSTRIES

and

CENTRAL JERSEY INDUSTRIES, INC.
Central Jersey Industries, Inc

Appellant

On Appeal from the United States
District Court
for the District of New Jersey
(D.C. Civ. No. 86-4870)

BEFORE: BECKER, STAPLETON,
and GREENBERG, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel June 9, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered February 11, 1988, and certified to this Court pursuant to 28 U.S.C. § 1292(b), be, and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

July 19, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5172

STANLEY ZULKOWSKI, SR.
& CLARA RUTH ZULKOWSKI

v.

CONSOLIDATED RAIL CORP.,
GARLOCK, INC.
CERTAIN-TEED CORPORATION
RAYMARK INDUSTRIES, INC., a/k/a
RAYBESTOS-MANHATTAN, INC.,
THE CELOTEX CORP.,
ARMSTRONG WORLD INDUSTRIES

and

CENTRAL JERSEY INDUSTRIES, INC.
Central Jersey Industries, Inc.

Appellant

D.C. Civ. No. 86-4870

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges

who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the court in banc, is denied.

BY THE COURT,

/s/ Morton Greenberg
Circuit Judge

Dated: Aug. 11, 1988

NOT FOR PUBLICATION

STANLEY ZULKOWSKI, SR. and CLARA RUTH ZULKOWSKI, Plaintiffs, vs. CONSOLIDATED RAIL CORP., et al., Defendants.	UNITED STATES DISTRICT COURT District of New Jersey Civil No. 86-4870 OPINION (Filed Dec. 28, 1987)

DEBEVOISE, District Judge:

This is an action by plaintiffs, a man who alleges asbestos-related injuries and his wife, against Consolidated Rail Corp. (Conrail), CJI Industries, Inc. (CJI), and a number of other defendants, seeking to recover damages for personal injury and loss of consortium. The suit was brought under the Federal Employer's Liability Act (FELA), 45 U.S.C. secs. 51-60. The plaintiff maintains that he developed latent occupational injuries as the result of work for Central Railroad Company of New Jersey (CNJ), which was reorganized in bankruptcy under the name CJI, from 1962 to 1976, for Conrail from 1976 to 1979, and for other non-railroad firms before 1962.

The action is before the court on a motion by CJI Industries for summary judgment to the effect that it is not liable to plaintiff, because any liabilities which it would have otherwise faced devolved upon Conrail as part of the reorganization which culminated in the transfer of CNJ's rail assets to Conrail.

The first requirement for summary judgment is, of course, an absence of disputed issues of material fact. Here, it does not appear that factual issues are in dispute. Conrail does not dispute CJI's chronology of the events leading to the transfer of CNJ's railroad assets to Conrail. What is in dispute is the legal implications of that transfer—whether CJI continues to be liable for pre-organization injuries caused by CNJ's negligence.

Since material facts are apparently not in dispute, the issue appears ripe for summary judgment. The relationship between Conrail and the railroads whose assets is acquired is, as both parties recognize, governed by bankruptcy reorganization plans and by the Regional Rail Reorganization Act of 1973.

Conrail's formation and its acquisition of rail assets from CNJ and other railroads occurred as part of Congress' response to the rail transportation crisis of the 1970's. CNJ and several other railroads were in grave financial difficulty in the late 1960's. On March 22, 1967, CNJ filed for reorganization in bankruptcy under Section 77 of the Bankruptcy Act of 1898, as amended, formerly codified at 11 U.S.C. sec. 205. In 1973, Congress enacted the Regional Rail Reorganization Act of 1973 (the "Rail Act"), codified as amended at 45 U.S.C. secs. 701-797. In that legislation, Congress provided for the creation of Conrail and provided that assets of a number of railroads undergoing reorganization would be conveyed to Conrail pursuant to a Final System Plan to be devised by the United States Railway Association and approved by Congress. Pursuant to this mandate, Conrail commenced operations on April 1, 1976, and acquired rail assets from a

number of railroads, including CNJ. In return, the bankrupt rail carriers received Conrail stock and securities. *See generally* Perritt, Ask and Ye Shall Receive, The Legislative Response to the Northeast Rail Crisis, 28 Vill. L. Rev. 271, 300 (1983). Many employees of those railroads, plaintiff among them, transferred to Conrail. Following Conrail's formation and CNJ's transfer of most of its rail assets to Conrail, an amended plan of reorganization for CNJ was approved by the United States District Court for the District of New Jersey, and the consummation date was fixed for September 14, 1979. On that day, the Trustee of the CNJ filed, pursuant to Section 14A:1-4 of the New Jersey Corporation Act, a Restated and Amended Certificate of Incorporation which provided that the name of the corporation was Central Jersey Industries, Inc., and adopted by-laws. CJI received the remaining CNJ assets and commenced post-reorganization activities. CNJ's shareholders and unsecured creditors received nothing in the bankruptcy distribution. For several years, CJI operated with a very small staff; it currently has substantial non-rail operations. Net sales in 1985 were $117.6 million, with operating income of $5.8 million in the same year.

Now, CJI argues that the effect of its reorganization in bankruptcy was to impose liabilities associated with its predecessor's rail operations on Conrail.

This type of issue is not a matter of first impression in this circuit. The Third Circuit examined CJI's attempts to insulate itself from tort liability in *Matter of Central Railroad Company of New Jersey*, 758 F.2d 938 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). The court found that claims which had not arisen at the time of the bankruptcy

proceedings—because the injuries had not manifested themselves—were not "claims" for purposes of discharge in bankruptcy and therefore were not covered in the discharge in bankruptcy. The court of appeals declined to consider successor liability issues, because the district court had not done so. *Id.* at 944.

On remand, the Reading Company argued that the reorganized Reading Company was entirely distinct from the earlier Reading Company, and that any liability for former employees' FELA claims had passed to Conrail. *Schweitzer v. Consolidated Rail Corp.*, 65 B.R. 794 (E.D. Pa. 1986). Like CJI here, Reading argued that reorganization under the Rail Reorganization Act is distinct from non-rail reorganizations in that a Rail Act reorganization yielded two reorganized entities. Reading contended that Conrail was the reorganized entity with respect to the debtor's rail operations while Reading was the reorganized entity with respect to non-rail operations. Since asbestos claims stemmed from rail operations, Reading argued, Conrail was responsible. Conrail also argued that Congress did not intend in the Rail Act to fundamentally alter principles of reorganization law to create two reorganized entities.

Judge Ditter carefully analyzed the issues involved. He believed, as do I, that the dispositive question is whether Congress intended in section 77 of the Bankruptcy Act and the Rail Act to pass the debtor's non-discharged rail obligations to Conrail. *Id.* at 800. He reviewed the legislative history and structure of the Rail Act, and concluded that "Congress did not intend to alter a fundamental concept of reorganization law to relieve a debtor's successor and saddle a wholly-new entity that was created

by Congress to serve the public interest with non-discharged claims against the debtor." *Id.* Judge Ditter observed that the purpose of the creation of Conrail was not to enable the companies involved to avoid liquidation of non-rail operations, but to restore financial viability to rail transport. *Id.* at 801. Congress assigned responsibility to Conrail for certain specific post-conveyance rail obligations that arose prior to conveyance, but did not impose on Conrail a generalized responsibility for rail obligations that accrue after conveyance but stem from pre-conveyance activities. *Id.* at 801-02. *Cf. Howard v. Penn Central Transp. Co.*, 87 F.R.D. 342 (N.D. Ohio 1980) (Conrail cannot be held liable for damages for civil rights violations of Penn Central occurring before 1976); *Stratford Land & Improvement Co. v. Blanchette*, 448 F. Supp. 279 (Regional Rail Reorg. Ct. 1978) (Conrail was not successor corporation with liability for cost of side track construction even though Conrail acquired tracks).

Examining 45 U.S.C. 797(h) in conjunction with 45 U.S.C. 721(h)(1)(A) further suggests that Congress absolved railroads of liabilities for certain "claims" for personal injury or death, and allocated funds for handling such claims which arose in the near future, but made no comparable provisions for causes of actions which did not yet exist at the time of reorganization.

CJI argues that rather than following Judge Ditter's approach, I should take guidance from the Sixth Circuit's decision in *Erie Lackawanna Railway Company v. Henning*, 803 F.2d 881 (6th Cir. 1986), *cert. denied*, — U.S. — (1987), which held that neither Conrail nor plaintiffs alleging latent injuries could proceed against a reorganized

railroad. The Sixth Circuit relegated plaintiffs to possible remedies against asbestos manufacturers and installers, finding that permitting recovery from the company which was the successor in bankruptcy to plaintiffs' employer would create a "palpably unjust" result by subjecting unsecured creditors to "massive liability." *Id.* at 885. The court concluded that plaintiffs were barred from suing their employer's successor because the specific type of bankruptcy restructuring which had occurred in that case was closer to a liquidation for the benefit of creditors than to a standard reorganization. Like other reorganized railroads, Erie Lackawanna divested itself of rail assets; all that remained were non-rail assets. However, the "liquidation" aspects of that company's restructuring went much further than disposing of rail assets. Erie Lackawanna's reorganization plan, unlike CJI's called for liquidation "as expeditiously as practicable," *id* at 883, and provided that the company would liquidate automatically by the end of 1988 unless seventy-five percent of shareholders voted to continue the company in existence. The restructuring was not designed to create a new, reorganized company which would continue in existence for the long term.

Though CJI's plan contained no explicit liquidation provision, CJI attempts to call into question the continuity between CNJ and CJI, indicating that CNJ's shareholders and unsecured creditors received nothing in the bankruptcy distribution and that CJI at its inception was a very small operation. However, the reorganization of CNJ was far closer to that of the Reading Company, addressed in *Schweitzer v. Consolidated Rail Corp.*, 65 B.R.

794 (E.D. Pa. 1986), than that of Erie Lackawanna: both CNJ and Reading jettisoned unprofitable rail assets which were operated by conrail for stock. Both operated for a time under the umbrella of the bankruptcy court, and both emerged from bankruptcy as a viable non-rail business. In each case, the bankrupt's estate was ultimately paid cash for its Conrail stock by the United States Railway Association which was then used to pay creditors or operate the new business. Thus, from the point of view of "economic reality," there is substantial continuity between CNJ and CJI.

Examining "corporate formalities" produces the same result. As Judge Ditter noted, *id.* at 801 n.5, while "[a]n outsider observer might perceive as the debtor's successor an entity which received a substantial portion of [its] assets," "a corporation is a creature of statute, deriving its essence from its articles of incorporation and by-laws. Where the debtor's articles of incorporation are passed to an entity through reorganization, it is this entity which is the reorganized company." CNJ's reorganization and transformation from a railroad to a holding company do not make it a different corporate entity or relieve it of pre-amendment liabilities. See 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations*, sec. 7329 (rev. perm. ed. 1983). As Judge Ditter put it, "[i]f, by the mere fact of reorganization and without reference to discharge, the reorganized company were freed of all claims other than those specified in the plan, there would not be a need to define broadly the terms, " 'liabilities, debts, claims, and discharge.' " *Schweitzer*, 65 B.R. at 799. The effect of discharge in bankruptcy is to discharge all claims which exist and are subject to discharge, not to protect suc-

cessor corporations from any claims which may arise in the future which have some relation to earlier activities.

Like *Erie Lackawanna*, the decision in *Consolidated Rail Corp. v. Reading Co.*, 654 F. Supp. 1318 (Regional Rail Reorg. Ct. 1987) is of limited relevance here. The Special Court held that Conrail was not entirely shielded from liability by federal preemption of common law successor doctrines. Conrail argues that common law successor doctrines would not make it liable here, where the original company continues to exist and where the underlying action is based on negligence. As plaintiffs point out, since Conrail has not moved for summary judgment exonerating it from liability on pre-1976 claims, these issues need not be resolved at this time.

CONCLUSION:

Defendant CJI's motion for summary judgment is denied. I will sign the order submitted by plaintiff's counsel.

/s/ Dickinson R. Debevoise, Dec. 28, 1987
DICKINSON R. DEBEVOISE, U.S.D.J. DATE

STANLEY ZULKOWSKI, SR. and CLARA RUTH ZULKOWSKI, Plaintiffs, vs. CONSOLIDATED RAIL CORP., et al., Defendants.	UNITED STATES DISTRICT COURT Distriet of New Jersey Civil No. 86-4870 ORDER (Filed Jan. 19, 1988)

DEBEVOISE, District Judge:

It appearing that there is a factual error in the opinion in this matter filed December 28, 1987, it is hereby ORDERED this 18th day of January, 1988, that on page 3, the sentence "In return (for rail assets conveyed to Conrail, the bankrupt rail carriers received Conrail stock and securities." be replaced with the following: "The Rail Act initially provided that the bankrupt rail carriers would receive Conrail stock and securities in return for the rail assets conveyed to Conrail. *See generally Perritt*, Ask and Ye Shall Receive: The Legislative Response to the Northeast Rail Crisis, 28 Vill. L. Rev. 271, 300 (1983). The Rail Act was subsequently amended to permit paying the bankrupt rail carriers with certificates of value redeemable in cash and constituting general obligations of the United States government. 45 U.S.C. sec. 748. In the end, after negotiation or litigation, each of the companies transferring rail assets to Conrail was paid for those assets in cash by the United States government." It is also ORDERED that the sentence on page 8 of the opinion that states "In

each case, the bankrupt's estate was ultimately paid cash for its Conrail stock by the United States Railway Association . . . " be amended by deleting the words "for its Conrail stock."

/s/ Dickinson R. Debevoise U.S.D.J. January 18, 1988 DATE

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STANLEY ZULKOWSKI, SR., and CLARE RUTH ZULKOWSKI,	)	
Plaintiffs,	)	UNITED
	)	STATES
vs.	)	DISTRICT
	)	COURT
CONSOLIDATED RAIL CORPORATION, CENTRAL JERSEY INDUSTRIES, INC., GARLOCK, INC., CERTAIN-TEED CORPORATION, RAYMARK INDUSTRIES, INC., a/k/a RAYBESTOS-MANHATTAN, INC., THE CELOTEX CORPORATION, ARMSTRONG WORLD INDUSTRIES,	)	FOR THE DISTRICT OF NEW JERSEY
	)	Civil Action No. 86-4870
	)	ORDER
	)	(Filed Feb. 9, 1988)
Defendants.	)	

CJI Industries, Inc. (sued herein as Central Jersey Industries, Inc.), having filed motions for summary judgment on (a) plaintiffs' claims against it and (b) on the crossclaim for indemnification asserted by Consolidated Rail Corporation against it; and the Court having considered the papers submitted in support and in opposition to said motions and having heard oral argument concerning same; it is hereby

ORDERED that:

(1) the motion of CJI Industries, Inc. for summary judgment on the complaint is denied;

(2) the motion of CJI Industries, Inc. for summary judgment on the crossclaim for indemnification asserted against it is denied;

(3) this Order involves controlling questions of law as to which there is substantial ground for a difference of opinion; and an immediate appeal from ths Order may materially advance the ultimate termination of the litigation;

(4) the controlling questions of law involved in this Order are:

> Whether Congress intended in § 77 of the Bankruptcy Act, and the Regional Rail Reorganization Act (Rail Act), as amended, or other law that Consolidated Rail Corporation or the transferors reorganized under the Rail Act, or both, would succeed to the responsibility for FELA claims that were unmatured at the time of the conveyances; and whether the nature of the reorganization of The Central Railroad Company of New Jersey precludes any liability on behalf of CJI Industries, Inc. on such claims.

/s/ Dickinson R. Debevoise,
J.U.S.D.C.

Federal Employers' Liability Act

§ 1 (45 U.S.C. § 51)

Liability of common carriers by railroad, in Interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

§ 7 (45 U.S.C. § 57)

Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Regional Rail Reorganization Act of 1973

§ 101(b) (45 U.S.C. § 701(b))

(b) Purposes

It is therefore declared to be the purpose of Congress in this chapter to provide for—

. . .

(2) the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region;

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§ 206(a)(1) (45 U.S.C. § 716(a)(1))

Final system plan

(a) Goals

The final system plan shall be formulated in such a way as to effectuate the following goals:

(1) the creation, through a process of reorganization, of a financially self-sustaining rail and express service system in the region;

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§ 206(d)(1) (45 U.S.C. § 716(d)(1))

(d) Transfers

All transfers or conveyances pursuant to the final system plan shall be made in accordance with, and subject to, the following principles:

(1) all rail properties to be transferred to the Corporation or any subsidiary thereof by a profitable railroad, by trustees of a railroad in reorganization, or by any railroad leased, operated, or controlled by a railroad in reorganization in the region, shall be transferred in exchange for stock and other securities of the Corporation or any subsidiary thereof (including obligations of the Association) and the other benefits accruing to such railroad by reason of such transfer.

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§ 207(b) (45 U.S.C. § 717(b))

Adoption of final system plan

(b) Approval

(1) Within 120 days after January 2, 1974, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this chapter. Within 60 days after the submission of the report by the Office, under section 715(d)(1) of this title, on the Secretary's report on rail services in the region, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be

reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this chapter. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this chapter, each such court shall order that the reorganization be proceeded with pursuant to this chapter unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act and that the public interest would be better served by such a reorganization than by a reorganization under this chapter, or (2) finds that this chapter does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding. If a court does not enter an order or make a finding as required by this subsection, the reorganization shall be proceeded with pursuant to this chapter. An appeal from an order made under this section may be made only to the special court. Appeal to the special court shall be taken within 10 days following entry of an order pursuant to this subsection, and the special court shall complete its review and render its decision within 80 days after such appeal is taken. There shall be no review of the decision of the special court.

(2) Whenever it has been finally determined pursuant to the procedures of paragraph (1) of this subsection, that the reorganization of a railroad subject to reorganization under section 77 of the Bankruptcy Act shall not be proceeded with pursuant to this chapter, the court having jurisdiction over such railroad may, upon a petition which is filed within 10 days after February 28, 1975, by the

trustees of such railroad, reconsider such order. Such reorganization court shall (i) affirm its previous order or (ii) issue an order that the reorganization of such railroad be proceeded with pursuant to this chapter unless it finds that this chapter does not provide a process which would be fair and equitable. The provisions of paragraph (1) of this subsection are applicable in such reconsideration, except that (A) such reorganization court shall make its decision within 30 days after such petition is filed, and (B) any decision by the special court on appeal from such a decision shall be rendered within 30 days after such reorganization court decision is made. There shall be no review of the decision of the special court. The Association shall take any steps it finds necessary, consistent with time limitations and other provisions of this chapter, to effectuate the consequences of such a revised order, including the preparation and submission of any necessary or appropriate supplements to the preliminary system plan.

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§ 209(b) (45 U.S.C. § 719(b))

Judicial review

(b) Special court

Within 30 days after January 2, 1974, the Association shall make application to the judicial panel on multi-district litigation authorized by section 1407 of Title 28 for the consolidation in a single, three-judge district court of the United States of all judicial proceedings with respect to the final system plan. Within 30 days after such application is received, the panel shall make the consolidation in a district court (cited herein as the "special court")

which the panel determines to be convenient to the parties and the one most likely to be able to conduct any proceedings under this section with the least delay and the greatest possible fairness and ability. Such proceedings shall be conducted by the special court which shall be composed of three Federal judges who shall be selected by the panel, except that none of the judges selected may be a judge assigned to a proceeding involving any railroad in reorganization in the region under section 77 of the Bankruptcy Act. The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court. The special court shall have the power to order the conveyance of rail properties of railroads leased, operated, or controlled by a railroad in reorganization in the region. The special court may issue rules for the conduct of any proceedings under this section and under section 745 of this title, including rules with respect to the time within which motions may be filed, and with respect to appropriate representation of interests not otherwise represented (including the Secretary with respect to a petition by the Association in the case of a proposal developed by the Secretary, under such section 745 of this title). No determination by the panel under this subsection may be reviewed in any court.

Bankruptcy Act of 1898

§ 77 (Former 11 U.S.C. § 205)

(b) Plan of reorganization—Definitions—Limitations. A plan of reorganization within the meaning of this

section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satis-

faction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidence of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act [this title], including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interest of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 60 of this Act [§ 96 of this title] shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) hereof. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

* * *

(f) Effect of confirmation and carrying out of plan. Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right

of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgage, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as

may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act [49 § 1 et seq.] as now or hereafter amended. The provisions of title I and of section 5 of the Securities Act of 1933, as amended [15 §§ 77a-77aa], shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said Securities Act [15 §§ 77a-77aa], be treated as if they were specifically mentioned in sections 3 and 4 of the said Securities Act [15 §§ 77c, 77d], respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subdivision (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) hereof. The provisions of subdivision (a) of section (14) of the Securities Exchange Act of 1934 [15 § 78n(a)], shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) hereof.

* * *

DOCUMENT NO. 3638

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In the Matter of	) In Proceedings for
	) the Reorganization
ERIE LACKAWANNA	) of a Railroad
RAILWAY CO.	)
Debtor	) No. B72-2838

ORDER NO. 1281

As prologue to addressing the issues of moment before the court a brief historical summary of this proceeding is in order.

Section 77 of the Bankruptcy Act (formerly 11 U.S.C. § 205)[1] was supplemented in 1973 by the Regional Rail Reorganization Act ("Rail Act") (as amended, 45 U.S.C. § 701 *et seq.*) to confront and accommodate the existing crisis of the northeast railroads, including the Debtor.[2] The Rail Act was promulgated by Congress to facilitate

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[1]On June 4, 1972, Debtor filed for reorganization pursuant to Section 77 of the Bankruptcy Act which was directed exclusively to railroad reorganizations. The current Bankruptcy Code became effective October 1, 1979 and applies only to actions commenced thereafter. To the extent that any case interpreting the Code would articulate a different result than Section 77 with respect to the issues joined herein by the amended pleadings, it should be analyzed in light of the existing differences between the Act and the Code.

[2]For purposes of this opinion, the Erie Lackawanna Railway Company is referred to as, "the Debtor"; Erie Lackawanna, the reorganized company is referred to as "Erie"; Consolidated Rail Corporation is referred to as "Conrail", and the Final Plan of Reorganization is referred to as "the Plan".

the reorganization of these railroads into a single viable system to be operated by Conrail. Pursuant to the Rail Act on March 30, 1976, the Debtor ceased all rail operations and shortly thereafter the bulk of its rail properties were conveyed to Conrail, thus concluding the Debtor's tenure as an operating railroad. Subsequent to this conveyance, the Debtor's limited resources precluded its reorganization as an ongoing business entity, and its Plan evolved, pursuant to Section 77, as a "liquidating" plan consistent with § 601(b)(4) of the Rail Act, which provided that the bankruptcy court "shall proceed to reorganize or liquidate such railroad in reorganization pursuant to Section 77 on such terms as the court deems just and reasonable, or pursuant to any other provisions of the Bankruptcy Act, if the court finds that such action would be in the best interests of such estate." 45 U.S.C. § 791. Accordingly, the Debtor was not restructured as an ongoing operational railroad but emerged as a completely different and distinct entity in the form of a liquidating corporation. It is not inconceivable, and perhaps more probable, that the Debtor as reorganized may cease to exist in the not too distant future.

During the intervening ten-year period between June of 1972 and November of 1982, the parties under the aegis of the reorganization court and pursuant to the mandate of § 77 proceeded to readjust the entire financial structure of the Debtor and materially modify and alter the rights of creditors and security holders so as to best serve all interested parties including the Debtor, its creditors and security holders by formulating a plan that was fair and equitable to all classes of creditors. Bankruptcy Act, form-

erly 11 U.S.C. § 205(b); *Van Schaik v. McCarthy,* 116 F.2d 987, 992 (10th Cir. 1941). Arduous, exhaustive and comprehensive negotiations and compromises were rewarded by a court-approved plan of reorganization which was consummated by a final degree of discharge on November 30, 1982 (Order No. 1235). The Consummation Order declared this court's exclusive jurisdiction over the Debtor and its property and "all claims . . . whether or not properly or timely filed and whether or not approved in these proceedings." *Id.* at 2. Section 3.01 of the Consummation Order, and Section 3.3 of the Plan, directed the transfer of the Debtor's properties to Erie, free and clear of all claims, subject to certain exceptions defined in the Plan. Section 3.04 of the Consummation Order provided, in pertinent part, that

> The Debtor and the Debtor's Trustees shall, as of the Consummation Date, be discharged and released forever from
>
> > (a) All obligations, debts, liabilities and claims against the Debtor, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings and whether or not provable in bankruptcy, including without limitation all claims assumed or guaranteed by the Debtor or enforceable against the property of the Debtor;

Paragraph 3 of the order permanently enjoined all persons and entities from prosecuting any action against Erie on account of any claim against the Debtor, except as permitted in the Plan. Paragraph 4(vi) of the Final Decree reserved to this court's jurisdiction the authority to enforce the injunctive provisions of the final decree.

La Scala v. Consolidated Rail Corporation, et al. (Docket No. 84-1395) and *Henning v. Consolidated Rail Corporation, et al.* (Docket No. 84-1396) were commended in the United States District Court for the Eastern District of Pennsylvania on March 22, 1984, approximately sixteen months after the final consummation date of the Debtor's Plan. It must be noted that during this intervening period and continuing thereafter, Erie stock has been actively traded on the open market. The complaints in both actions are virtually identical and named the same thirty companies as defendants. Apart from the Debtor, Erie, Conrail and New Jersey Transit Rail Operation (N.J. Transit) (collectively the "Railroad Defendants") the remaining named defendants are asbestos manufacturers, suppliers and installers. La Scala-Henning seek damages against the Railroad Defendants pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51-60, the Federal Safety Appliance Acts, 45 U.S.C. §§ 1-16 and the Boiler Inspection Acts, 45 U.S.C. 22-34. In these negligence actions La Scala-Henning charge that their exposure to products containing asbestos during their railroad employment resulted in the development of serious respiratory disease. They also assert causes of action against the remaining defendants predicated on theories of negligence, strict product liability, breach of warranty, conspiracy, fraudulent concealment and misrepresentation.

On October 26, 1983, the State of New York initiated an action in the New York State Supreme Court, Albany County, against Conrail, alleging that it was strictly liable under Article 12 of the New York Navigation Law for the costs incurred by the State in removing and cleaning up a discharge of a petroleum product from the Hornell Rail-

road Yard into the Canisteo River. On February 14, Conrail initiated a third-party action (the "environmental action") against Erie as successor corporation of the Debtor for any liability Conrail may incur by virtue of its acquisition of the Hornell Railroad Yard from the Debtor in 1976, and against the City of Hornell Industrial Development Agency for any liability Conrail may incur by virtue of Conrail's sale of the yard to the agency in 1978.

La Scala-Henning urge this reorganization court to reopen its final order dated November 30, 1982, which discharged the Debtor and Erie from all future liability, in order to permit the prosecution of their respective claims against the Debtor and Erie for asbestos-related personal injuries which may have occurred prior to the final Discharge and Consummation Date of the Plan, but which did not manifest themselves until subsequent thereto. Conrail would also reopen the final bankruptcy discharge order to recover restitution from the Debtor and Erie for property damage which Conrail may have incurred as a result of the environmental action filed by the State of New York.

The issues presently confronting the Court were joined by Erie's petition seeking to declare the final discharge of the Debtor's estate and the final consummation of the Plan a bar against all post discharge claims asserted by La Scala, Henning and Conrail, and to permanently enjoin them from prosecuting their personal injury and/or property claims against the Debtor and Erie.

In effect, the asserted claims challenge the very essence of the Bankruptcy Act by seeking to compromise the finality historically accorded consummated reorgani-

zation plans and final discharge orders issued by reorganization and bankruptcy courts.

Stated differently, La Scala-Henning and Conrail seek to pierce the invulnerability of consummated plans of reorganization and/or final discharges in bankruptcy by mandating into perpetuity the right to file claims for post discharge manifested latent injuries allegedly incurred prior to the issuance of such final orders.

At this juncture in the proceedings, it should be noted that although this Court has temporarily enjoined the prosecution of the cases against the discharged Debtor and Erie pending disposition of this controversy, it has not interfered with the rights of La Scala-Henning to pursue their respective personal injury claims against Conrail and/or the manufacturers, distributors and installers of asbestos products which the parties continue to aggressively press. Nor has it interfered with the State of New York from pursuing its property claim against Conrail. Accordingly, the aggrieved parties are not deprived of alternate sources of recovery for their asserted injuries.

Section 77(b) of the former Bankruptcy Act (formerly 11 U.S.C. § 205(b)) provides the point of departure for this court's analysis of the issues here in question. That section reads in part as follows:

> Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, . . . and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as

> those who have accepted it . . . The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan . . . Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. . . .

The quoted seminal legislative pronouncement explicated the classically accepted purpose of the Bankruptcy Act as the vehicle for providing the discharged Debtor with a fresh start. This articulated Congressional design was succinctly set out by the Court of Appeals for the Sixth Circuit in its frequently cited opinion interpreting the purpose of a substantially similar provision in another Section 77 proceeding:

> The provisions for reorganization could not be realized if the discharge of debtors were not complete and absolute. . . . [If] courts should relax the provisions of the law and facilitate the assertion of old claims against discharged and reorganized debtors, the policy of the law would be defeated. . . . [C]reditors would not participate in reorganizations if they could not feel that the plan was final. . . . [I]t would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the plan and change the conditions which constituted the basis of its earlier acceptance.

Duryee v. Erie Railroad Company, 175 F.2d 58, 63 (6th Cir.), *cert. denied*, 338 U.S. 861 (1949).

The court's announcement in *Duryee* underscored the fundamental premise that the complete and absolute discharge of the Debtor was the keystone to the credibility of the Bankruptcy Act which prompted the Debtor, its creditors and security holders to accept material and detrimental changes of position to consummate a plan of reorganization. To conclude otherwise would have forever destroyed the full faith and credit of the Act by decimating the incentive of certainty and finality upon which debtors, their creditors and security holders of necessity were required to rely and continue to rely under the new Code.

Indeed, the Supreme Court on numerous occasions has stated that one of the primary purposes of the Bankruptcy Act was to afford debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Perez v. Campbell*, 402 U.S. 637, 648, 91 S. Ct. 1704, 1710-11, 29 L. Ed.2d 233 (1971) (citations omitted). "A salient element in such a reorganization is the discharge of all demands of whatsoever sort, executory and contingent, presently due or to mature in the future." *City Bank Farmers Trust Co. v. Irving Trust Co. et al.*, 299 U.S. 433, 438-39, 57 S. Ct. 292, 295, 81 L. Ed. 324 (1937). In discussing the policy of according the reorganized company a fresh start as against asbestos related tort claims, the Court of Appeals for the Seventh Circuit has posited that "the purpose of allowing contingent claims to be proved and discharged in a reorganization is to make it likelier that the bankrupt firm can emerge from the reorganization with fair prospects of success unhampered by the overhanging threat of liability for claims that had not been discharged . . ." *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 756 F.2d

508, 523 (7th Cir. 1985) (citations omitted). If a final bankruptcy order were to be reopened to permit claims of the type here asserted, and again reopened each time a new claim is asserted "final decrees and the courts which render them would know no rest, and the policy of the Reorganization Act to launch the reorganized corporation upon a new business life undisturbed and unembarrassed by claims against its predecessor would suffer a serious defeat." *Duryee v. Erie R. Co.*, 91 F. Supp. 1009, 1012 (N.D. Ohio 1950), *aff'd*, 191 F.2d 855 (6th Cir. 1951) (memorandum), *cert. denied*, 342 U.S. 948 (1952).

Section 3.04 of the Consummation Order here in issue, in compliance with the dictates of the Act, provided finality to all past, present and contingent future claims against the Debtor and Erie and discharged them from all debts, obligations, liabilities and claims.

This court is mindful of the recent decision of the United States Court of Appeals for the Third Circuit in *Schweitzer v. Consolidated Rail Corporation (Conrail) and the Reading Company, et al.*, 758 F.2d 936 (3rd Cir. 1985), which reversed two trial court decisions addressing analogous issues as here presented. Prior to examining the logic of the circuit court's reasoning in that decision, this court is prompted to momentarily digress and review the direct and lucid analysis of the trial court in those proceedings which confronted issues identical to those of the case at bar.

The District Court for the Eastern District of Pennsylvania barred similarly situated parties from reopening confirmed immutable Plans of Reorganization by anchoring its decision upon the essential elements of certainty and

finality integral to all discharges in bankruptcy. *Schweitzer v. Consolidated Rail Corp.*, 36 Bankr. 469 (E.D. Pa. 1984), *rev'd*, 758 F.2d 936 (1985). In its disposition, the trial court summarized by favorably quoting from the identical case of *In re Central Railroad Company of New Jersey*, 38 Bankr. 686 (D.N.J. 1983), wherein that court stated:

> Allowance of the claims asserted here and those that would likely follow in the future, would have a substantial impact upon the reorganized company. Furthermore, to permit the estate to be reopened each time a new claim is discovered, would preclude any finality to the reorganization proceeding.

In re Central Railroad Company of New Jersey, 38 Bankr. at 689.

The *Schweitzer* trial court thereupon proceeded to reason that:

> While it may be harsh to those claimants whose injuries did not become manifest until after the debtor's estate was closed, their claims cannot be heard. This result is inescapable due to the need to be consistent with the expectations of the creditors and stockholders who participated in the reorganization.

Schweitzer, 36 Bankr. at 472.

Thus the immutable finality accorded discharges in bankruptcy and/or plans of reorganization by both the *Schweitzer* and *Central Railroad Company of New Jersey* (CNJ) trial courts would foreclose all pre and post consummation order claims including contingent or "future" claims of the type advanced by La Scala-Henning and Conrail.

Returning to the assessment of the Third Circuit's opinion in *Schweitzer*, this court's attention is initially di-

rected to the inescapable conclusions conceded by the court:

> Section 77(b) in pertinent part provides that a plan of reorganization "shall include provisions modifying or altering the rights of creditors." "Creditors" include "all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this [Act]." "Claims" include "debts, whether liquidated or unliquidated . . . , or other interests of whatever character." 11 U.S.C. § 205(b) (repealed 1978).
>
> Section 77(f) provides that confirmation of the reorganization plan is binding upon "all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." Moreover, if the plan so provides,
>
> > [t]he property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debt shall be discharged from its debts and liabilities.
>
> 11 U.S.C. § 205(f) (repealed 1978).
>
> The quoted statutory language clearly provides broad authorization for the discharge in bankruptcy of claims against the debtor in order to secure a fresh start for a company resulting from a section 77 reorganization. It is equally clear that plaintiffs' rights only could have been affected by the discharge of all "claims" against their employer if they had "claims" within the meaning of section 77 prior to the consummation date of their employer's reorganization.

Schweitzer, 758 F.2d at 941.

Having acknowledged the sweeping scope and inclusiveness of the terms "claim" and "creditor" within the context of Section 77 of the Act, the circuit court proceeded to severely constrict its application of the Act and reasoned that the plaintiffs' FELA causes of action, to come within the orbit of "dischargeable" claims under Section 77, had to exist prior to the relevant consummation date. Although it further acknowledged that under certain circumstances a cause of action could "exist" before it "accrued", it concluded that these FELA plaintiffs had no cause of action prior to final consummation because they did not at that time have compensable injuries pursuant to general principles of tort law. It articulated the above conclusion while recognizing that the term "claim" as defined in Section 77 "included debts, whether liquidated or unliquidated, securities . . . , liens or other interests of whatever character" and that the term "Creditors" included "all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act . . ." *Id.*[3]

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[3]It is interesting to note that the definition of "claim," when read together with the definition of "creditor" under Section 77, is identical in substance to the definition of "claim" found in Chapter 10, Section 106(1) (former 11 U.S.C. § 506), dealing with corporate reorganizations. The definition in the latter section has been construed as "sweeping in scope":

> Within its purview is any character of a claim against the debtor or its property, whether or not such claim is provable under § 63 of the Act, and whether secured or unsecured, liquidated or unliquidated, fixed or contingent. This is, of course, a more inclusive definition than that applicable in ordinary bankruptcy, and it should be given a

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It went on to state further that without a legal relationship between tortfeasor and tort victim there could not be any cognizable "interest" under Section 77. Consequently, there could be no legal relationship between Reading and Central Railroad Company of New Jersey (CNJ) and their employees-plaintiffs relevant to the employees' future tort actions from which a Section 77 "interest" could flow.

Thus, by emphasizing the injury element of the FELA tort claims and ignoring the express definitions of "claim" and "creditor", and further by mandating the manifestation of injury as a prerequisite to the existence of a "claim" or "right" cognizable in bankruptcy, the Third Circuit literally read into the Section 77 definitions of "claim" and "creditor" the provability and "right to payment" requirements that had been expressly deleted from those definitions.

The Third Circuit cited to four factors as support for its analyses and conclusions. In discussing factors one and two, it noted that the defendants in *Schweitzer* failed to cite a single opinion, other than the district court opinions in those cases, holding that a tort cause of action as yet nonexistent under applicable tort law is a contingent claim within the meaning of the Bankruptcy Act or Bankruptcy Code. However, the court then attempted to distinguish and discount the Second Circuit decision inter

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broad construction with respect to claims and creditors in order to dispose of all liabilities of the debtor in reorganization. *In Re Stirling Homex Corp.*, CCH Bank. Des. ¶ 66,-850 (2d Cir. 1978), *quoting* 6 Collier on Bankruptcy ¶ 2.05, at 306 (1978).

preting Section 77(b) of the Bankruptcy Act in *In re Radio-Keith-Orpheum Corp.*, 106 F.2d 22 (2d Cir. 1939), *cert. denied*, 308 U.S. 622 (1940), as not controlling in *Schweitzer*. It stated that in *In re Radio-Keith-Orpheum Corp.*, although there had been no breach of the controversial lease agreement there in issue and thus no existing cause of action pursuant to the guarantees in the lease, there was a guarantor-guarantee legal relationship from which an interest in the guarantee could flow. This was purportedly in contrast to *Schweitzer*, wherein the court concluded the plaintiffs had no "interests" of any character before injury manifested itself since there was no legal relationship as between the tort-feasor and a tore victim until the tort had actually occurred. The argument, however, ignores the statutory "legal relationship" imposed by the FELA upon former railroad employers to provide their employees with a safe place to work. The analogous legal relationship imposed by the FELA undermines the very foundation of the Third Circuit's statement that in contrast to the private guarantee arrangement in *In re Radio-Keith-Orpheum Corp.* (holding such arrangement created a cognizable "interest" under Section 77(B)), railroads and their employees had no statutory "legal relationship." Since railroad employees "bargained" for a safe place within which to work free of negligence, and this was guaranteed by the employer, there did in fact exist a legal relationship from which an interest could flow.

Third, the circuit court cited to the congressional intent as support for its conclusions. This court's research has been unable to surface even an inferential indication

for the circuit court's statement. The Court's statement addressing congressional intent appears to be sheer conjecture.

Fourth, the circuit court's reliance upon *Mooney Aircraft Corp. v. Foster*, 730 F.2d 367 (5th Cir. 1984) is misplaced. In *Mooney*, wrongful death actions were commenced agains the ultimate purchaser of the debtor's assets, some five years after the first transfer of those assets, under a theory of common law successor liability. The Fifth Circuit concluded that absent a "provable" claim by the plaintiff under Section 63 of the Bankruptcy Act, the bankruptcy court was without jurisdiction to enjoin the plaintiffs from pursuing actions against the successor corporation. Since, as previously set forth, the provability requirement of Section 63 of the Act was discarded in Section 77, *Mooney* is not relevant to the analysis of the propriety of permitting La Scala Henning to pursue claims against Erie. Section 77 does not require a claimant to demonstrate a "right to payment" to support a claim. All that is required is that the claimant have a cognizable interest regardless of whether the underlying claim is contingent or in futuro and regardless of its provability during reorganization.[4]

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[4]This court does not place the same reliance upon *Avellino & Bienes v. M. Frenville Co., Inc. (In re M. Frenville Co., Inc.)*, 744 F. 2d 332 (3d Cir. 1984), as is accorded that citation by both the Third Circuit in *Schweitzer* and by Conrail in its brief.

Initially it should be noted that *In re M. Frenville Co., Inc.* arose under 11 U.S.C. Section 362(a) of the Bankruptcy Code and not under Section 77 of the Bankruptcy Act. The issue in that case was the application of the automatic stay provision

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In contrast to the conclusions in these cases, a number of courts have affirmatively decided that in asbestosis cases future claimants have an "interest" in bankruptcy proceedings of sufficient magnitude to warrant the appointment of a representative to protect their "interests" by the bankruptcy court. In *In re Johns-Manville Corp.*, 36 Bankr. 743, 753, the court, in considering the right of future asbestosis claimants to be declared "parties in interest" so as to permit their participation in ongoing reorganization proceedings stated:

> In the instant case, this comprehensive definition of bodily injury covering mere exposure militates in favor of a declaration that those who have been exposed to asbestos pre petition and have manifested or will manifest disease post petition are parties in interest to this reorganization case.
>
> Thus, this policy underlying the finding that mere exposure triggers coverage likewise militates in favor of a declaration that future claimants are parties in interest.

The reasoning in *In re Johns-Manville Corp.* is in harmony with the Third Circuit's decision in *In re Ama-*

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of the Code to pre-bankruptcy acts of the debtor wherein the cause of action from those acts accrued post petition. (The proceeding was on-going since no final discharge had issued.) The court was not confronted with dischargeability under Section 77 of the Act as in this case. The pivot of the Court's decision turned on the definition of "claims" under 11 U.S.C. Section 101(4). That definition directs that the claimant have a "right to payment" regardless of whether that claim is unliquidated, contingent, immaterial and disputed. The court stated at page 36.

> the threshold requirement of a claim must first be met —there must be a "right to payment".
>
> Section 77 of the Act required no such condition.

tex Corp., 755 F.2d 1034 (3d Cir. 1985), wherein the Third Circuit reversed the district court and, in an apparent contradiction of the *Schweitzer* reasoning, recognized the existence of future claimant "interests" in on-going bankruptcy proceedings:

> We conclude that future claimants are sufficiently affected by the reorganization proceedings to require some voice in them. Moreover, none of the parties currently involved in the reorganization proceedings have interests similar to those of future claimants, and therefore future claimants require their own spokesman. The court continued:
>
> Moreover, by terming future claimants parties in interest we do not prejudge the difficult questions of whether and how to protect their interests most effectively.

In re Amatex Corp., 755 F.2d at 1042-43.

In its disposition of Amatex, the Third Circuit in characterizing future claimants as parties in interest to the reorganization proceedings nevertheless deferred into the future a decision of "whether future claimants can or should be considered 'creditors' under the Code." *Id.* Subsequently, in *Schweitzer* it concluded that such individuals did not have "dischargeable claims" and were not therefore "creditors".[5] It would appear that the existence

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[5]*In re Amatex Corp.*, 30 Bankr. 309 (Bankr. E.D. Pa. 1983), 37 Bankr. 613 (E.D. Pa. 1983), *rev'd*, 755 F. 2d 1034 (1985), like *In re UNR Industries, Inc.*, 20 Bankr. 741 (N.D. Ill. 1983), *appeal dismissed*, 725 F. 2d 1111 (7th Cir. 1984) is distinguishable from the case at bar in a number of material respects. Initially, both reorganization proceedings were voluntarily commenced by the respective manufacturers of asbestos products in fear of an anticipated proliferation of future asbestos related litigation

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and the potential liability and legal costs arising as a result thereof which would be beyond the company's ability to manage, control or pay. Secondly, both Amatex and UNR were being reorganized as ongoing concern. Thirdly, in both instances the courts were petitioned by the debtors to appoint a guardian to represent the interests of future asbestosis claimants. Fourth, no final order of discharge or consummated plan of reorganization had issued in either proceeding. Lastly, both actions were being conducted pursuant to the present Bankruptcy Code, 11 U.S.C. § 101 *et seq.* and not under Section 77 of the Bankruptcy Act § 205 which constituted Chapter VII of the Bankruptcy Act.

In both instances the district courts refused to appoint a representative to represent interests of individuals who had in some way been exposed to asbestos and who could eventually seek damages from the debtors for injuries resulting therefrom. In both cases the district courts' opinions evolved from an interpretation of the Bankruptcy Code, particularly 11 U.S.C. §§ 101(4)(A), 101(9) and 105, and not Section 77 of the Bankruptcy Act. The courts reasoned that under the Code the existence of a claim sounding in tort accrued when an individual suffered injury. Thus, the claim of an asbestos plaintiff did not arise under *state law* until the plaintiff knew or should have known about the injury; consequently since asbestos exposed plaintiffs had no claim under state law for asbestos related diseases until injury became known, they had no cognizable claims under the Bankruptcy Code and were, therefore, not creditors.

In *In re UNR Industries, Inc.*, 725 F. 2d 1111 (7th Cir. 1984) the U.S. Court of Appeals for the Seventh Circuit dismissed the appeal for jurisdictional reasons by holding that the order of the district court was not a final appealable order and also failed to qualify under the "collateral order" doctrine created by the Supreme Court in *Cohen v. Beneficial Industrial Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

In its decision the court expressed serious reservation about the lower court's disposition of the matter when it stated:

> Even in states where exposed workers are not injured in a tort sense till the disease manifests itself, and therefore do not have an accrued tort claim in any sense, and even assuming that an unaccrued tort claim cannot be a "claim" within the meaning of 11 U.S.C. § 101(4)(A) (that is, a

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of future claimant "interests" within Third Circuit precedent would materially vary in pre-petition ongoing reor-

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> "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured"), a bankruptcy court's equitable powers (on which *see, e.g., Pepper v. Litton*, 308 U.S. 295, 304, 60 S. Ct. 238, 244, 84 L. Ed. 281 (1939); 1 Remington, A Treatise on the Bankruptcy Law of the United States § 22 (Henderson 5th ed. 1950) just might be broad enough to enable the court to make provision for future asbestosis claims against the bankrupt when it approved the final plan of reorganization. The date on which a person exposed to asbestos happens to develop a diagnosable case of asbestosis is arbitrary. Could it not be argued therefore that a bankruptcy court can and should use its equitable powers, which traditionally "have been invoked to that end that . . . substance will not give way to form, that technical considerations will not prevent substantial justice from being done," 308 U.S. at 305, 60 S. Ct. at 244 (especially, perhaps, in a reorganization case, *see In re Michigan Brewing Co.*, 24 F. Supp. 430 (W.D. Mich. 1938)), to prevent the liquidation or discharge of the bankrupt before provision is made for such persons?
>
> *In re UNR Industries, Inc.*, 725 F. 2d at 1119.

As hereinbefore noted, the Third Circuit in *In re Amatex Corp.* reversed the district court and declared that future asbestos claimants were cognizable parties in interest to the reorganization proceedings.

In commenting upon the logic expressed by the trial courts in *Amatex* and *UNR*, Judge Lifland in *In re Johns-Manville Corp.*, 36 Bankr. 743 (Bankr. S.D. N.Y. 1984) rejected, out-of-hand, the court's rationale on the issue of dischargeability:

> It is the view of this Court that the declarations by Judges Hart and King that these future claims are nondischargeable in bankruptcy are based on superannuated and considerably narrow notions of what constitutes a claim dischargeable in bankruptcy. These notions are at odds with the expanded definition of "claim" contained in Section 101(4) of the Code . . . Congress specifically intended to afford the broadest possible scope to the definition of "claim" so as to enable Chapter 11 to provide pervasive and comprehensive relief to debtors. 36 Bankr. at 754, n. 6.

ganization proceedings and post discharge final dispositions. The Third Circuit failed to address the apparent contradiction between its decisions in *Amatex* and *Schweitzer*.

In summary, this court is impressed by the comprehensive analysis of Judge Fullam in *In the Matter of Penn Central Transportation Company,* 42 Bankr. 657 (E.D. Pa. 1984), which strikes to the very heart of the issue confronting this court. In that railroad reorganization proceeding the petitioners sought leave of the reorganization court to pursue antitrust actions against the Penn Central Corp. (PCC), the reorganized company which was formed as part of the Plan of Reorganization of the Penn Central Transportation Company (PCTC), the Debtor in Section 77 reorganization proceedings. The court had issued its confirmation of the Plan of Reorganization and its Order of Consummation of the Plan on August 17, 1978, and October 24, 1978, respectively pursuant to Section 77(f) of the Bankruptcy Act.

Notwithstanding the injunctions imposed by the orders and Section 77(f) against suits against PCC, petitioners filed complaints alleging antitrust actions against PCC and others on September 17, 1980 and March 5, 1981. The actions by Pinney Dock and Litton (Petitioners) were founded on conduct of PCTC or its corporate predecessors.

Petitioners' antitrust claims were obviously not satisfied or even considered under the Plan. It was agreed between the parties that the petitioners did not have evidence of the alleged antitrust conspiracy until 1979 The petitioners argued that an unknown and undisclosed claim could not have been discharged under Section 77 of the Bankruptcy Act. The district court framed the issue in the following terms:

> Petitioners' approach actually raises the issue of the finality of the Confirmation Order: Does this Court have authority to exempt petitioners' antitrust actions or claims from the discharge of § 77(f)?

Penn Central, 42 Bankr. at 666.

The court thereupon traced the evolution of Section 77 from the 1947 Supreme Court decision rejecting a railroad debtor's effort to reopen a confirmed plan of reorganization and to modify the plan. *Insurance Group Committee v. Denver & R.G.W.R. Co.*, 329 U.S. 607, 67 S. Ct. 583, 91 L. Ed. 547 (1947). It described the congressional reaction to the Supreme Court decision and the promulgation of P.L. 478 and its relationship to Section 77 of the Bankruptcy Act.

> Under P.L. 478, once an order of confirmation became final, the court could not reconsider or modify the plan. Finality of a confirmation order was defined to be expiration of the time within which to take an appeal or exhaustion of appeals which were taken.

Penn Central, 42 Bankr. at 666. The Court thereupon concluded:

> When § 77 and P.L. 478 are considered together in the context of the finality accorded plans of reorganization and arrangement under Chapters X and XI of the Act, the conclusion which must be drawn is that a § 77 plan of reorganization may not be altered once the order confirming the plan becomes final. Even if it is assumed that this court has residual equitable power to permit petitioners to participate under the PCTC's Plan of Reorganization, any potential exercise of that authority at this late date must be considered in the context of the long-standing bankruptcy policy that confirmation orders are final and the rights of the original participants under the Plan

> and third parties dealing in reorganization securities must be adequately protected.

Id. at 667.

Judge Fullam's concise disposition of the finality issue is an appropriate summary of the arguments presented by the parties to the case at bar.

La Scala-Henning and Conrail further charge a procedural due process infringement in the form of the Debtor's failure to provide adequate notice of the reorganization proceeding to permit interested parties to be heard. La Scala-Henning, although not claiming a total absence of notice, assert the right to personal notice. Conrail, on the other hand, disclaims notice in any form whether personal or by publication.

The Bankruptcy Act imposed wide discretion upon courts to designate the time and form of notice due with the caveat that such notice and opportunity for hearing be reasonable and appropriate in each case. *In re DCA Development Corporation*, 489 F.2d 43 (1st Cir. 1973). The court, in each instance, is required only to balance the individual's interest against the overall interest of efficient, final resolution of the claims, always mindful of the diminution of the Debtor's assets that may result from delay.

The First Circuit in *DCA* also stated:

> Moreover, even where formal notice to affected parties is omitted or is insufficient, informal or constructive notice which provides them with the same opportunity for a fair hearing can satisfy the procedural requirements of the Bankruptcy Act.

Id. at 47.

The conclusions articulated by the First Circuit in *DCA* merely restated the ultimate precedent enunciated by the Supreme Court as early as 1950 in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), which is dispositive of the Fourteenth Amendment due process issue of notice joined herein.

The due process infringement charged by La Scala-Henning, as interpreted by this court, is not the lack of notice but rather the form of the notice. More specifically, these putative claimants insist that only personal notice would have satisfied the constitutional requirements of due process. This contention is inapposite to existing precedent. *Mullane; American Land Co. v. Zeiss*, 219 U.S. 47, 31 S. Ct. 200, 55 L. Ed. 82 (1911). Apart from the foregoing, the putative claimants argue that "No notice issued during the course of the Erie reorganization proceeding was intended to, or did, provide any notice to future claimants that their unknown, unknowable, future claims would be discharged if they did not file proofs of claims." (Brief Conrail, p. 21) The argument infers an affirmative duty on behalf of the Debtor to notice claimants individually of the existence and nature of their claims. Neither Section 77 nor the Bankruptcy Act imposed a requirement. Moreover, the Supreme Court in *Mullane* repudiated any such duty upon the Debtor to investigate or anticipate possible future claims under circumstances where, as here, the Debtor had no knowledge of the existence of such future claims:

> Nor do we consider it unreasonable . . . to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although

> they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee . . . We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral, and we have no doubt that such impractical and extended searches are not required in the name of due process.

339 U.S. at 317-18.

The Bankruptcy Act placed the duty to assert claims squarely upon the shoulders of the claimant.

In the interests of conserving time and space, this court will not review its implementation of the generous provisions of Section 77(c)(7) and related sections of the Act that outlined the proof of claim requirements. Suffice it to say that the procedure adopted and pursued by this court conformed to or exceeded the mandates imposed by law. The liberal procedure was closely monitored by a Special Master appointed by the Court. Apart from soliciting the filing of claims by personal and constructive service, extensive public notice of filing dates and procedures for obtaining simplified standardized forms was widely publicized. Moreover, it is interesting to note that employee interests were effectively protected by the Railway Labor Executives Association (RLEA)[6] and the Con-

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[6]On November 19, 1972 the Railway Labor Executives Association (RLEA) moved this court to intervene as a party in interest to the reorganization, which motion was granted. The RLEA alleged that its intervention was predicated upon the following facts as asserted in its motion:

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gress of Railway Unions (CRU)[7] which tracked the reorganization of the Debtor from the dates of their inter-

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> The individual organizations [hereinafter listed] are the duly recognized representatives under the Railway Labor Act, 45 U.S.C.A. 151 *et seq.* for a substantial number of all railroad employees in the United States and have negotiated collective bargaining agreements with individual railroads pursuant to such representation . . . The employees of the Debtor Erie-Lackawanna Railway Company represented by the individual railway labor organizations affiliated with the Association have a substantial property and financial interest in actions which may be taken during the course of the present proceedings . . . The interest of the employees represented by the organizations affiliated with the Association will not be represented by any other party to this proceeding and such employees will be bound by judgments entered herein. The Association therefore submits that the grant of the motion by it and those affiliated organizations which represent employees on [sic] the Debtor Railroad to intervene in this proceeding in representation of interest of the employees of the Debtor Railroad, whose employment is governed by collective bargaining agreements between the Debtor Railroad and such affiliated railway labor organizations, is appropriate . . .

Its listed affiliates are: American Railway Supervisors' Association; American Train Dispatchers' Association; Brotherhood of Locomotive Engineers; Brotherhood of Railroad Signalmen; Brotherhood Railway Carmen of the United States and Canada; Brotherhood of Sleeping Car Porters; Int'l Assn. of Machinists & Aerospace Workers, Int'l Brotherhood of Boilermakers and Blacksmiths; Int'l Brotherhood of Electrical Workers; International Brotherhood of Firemen & Oilers; International Organization Masters, Mates & Pilots of America; National Marine Engineers Beneficial Association; Railroad Yardmasters of America; Railway Employes' Department, AFL-CIO; Sheet Metal Workers' International Association.

[7]On March 30, 1973 the Congress of Railway Unions (CRU) moved this court to intervene as a party in interest to the reorganization, which motion was granted. The CRU alleged that its intervention was predicated upon the following facts as asserted in its motion:

(Continued on following page)

vention on November 19, 1972 and March 30, 1973, respectively, to the final consummation of the Plan in November of 1982. During that period of active and aggressive participation in the reorganization of the Debtor by these organizations, nothing foreclosed the initiation of action similar to that approved in *Amatex, supra* and *In re Johns-Manville Corp, supra* designed to protect the future rights of putative asbestos exposed employees before the final discharge of the Debtor and Consummation of the Plan. Such action would have permitted the trustees, creditors, security holders and the Court to consider the potential and magnitude of future claims in the formulation of the Plan and thereby would have insured

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> The railway labor unions listed above are the legally selected and duly recognized representatives of the majority of all railroad employees in the United States . . .
>
> [T]he listed unions have negotiated collective bargaining agreements with virtually all of the railroads in the United States, including the Erie Lackawanna Railway Company . . .
>
> The employees of Erie Lackawanna Railway Company represented by the individual railway labor organizations affiliated with the CRU have a substantial property and financial interest in actions which may be taken during the course of the present proceeding . . . The interests of the employees represented by CRU through its member unions will not be represented by any other party to this proceeding and such employees will be bound by judgments entered herein.

The CRU includes as its members the chief executive officers of the hereinafter identified national and international railway unions: Brotherhood of Maintenance of Way Employes; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers; Express and Station Employes; Hotel & Restaurant Employes and Bartenders International Union; Seafarers' International Union of North America; Transport Workers Union of America; United Transportation Union.

against the catastrophic inequities that will arise as a result of post discharge post consummation recognition of such claims. This is especially true in light of the known injurious effects of asbestos exposure during the years before November 30, 1982, as is evidenced by the filing of more than 16,000 legal actions against manufacturers, distributors and installers of asbestos products during the years before August 26, 1982, the date on which Johns-Manville Corp. and its affiliates sought protection under Chapter 11, of Title 11 of the United States Code as a result of this great proliferation of asbestos litigation.

Equally without merit is Conrail's charge of defective notice when it is remembered that on April 1, 1976, most of the Debtor's properties and most of the Debtor's employees were transferred to Conrail. Throughout the restructuring of the northeast railroads, Conrail was an integral part of the reorganization proceeding. As a matter of fact, Conrail's existence was the direct result of the reorganization of the northeastern railroads including the Debtor.

Under existing circumstances, it is inconceivable that the former employees of the Debtor and Conrail were not aware of the bankruptcy proceedings.

This court concludes that the notice by publication implemented during the reorganization proceedings pursuant to Section 77 of the Bankruptcy Act and the mandates of *Mullane* afforded La Scala-Henning and Conrail the opportunity to appear and be heard and to assert their interests of whatever character during the pendency of the reorganization. Having failed to assert their interests which this court qualifies as claims under Section 77

of the Bankruptcy Act and, therefore, cognizable before the consummation of the Plan, La Scala-Henning and Conrail have lost the opportunity to have those interests evaluated in relation to the many other compelling and competing interests which were asserted during the reorganization.

The proceedings in reorganization having been concluded, the La Scala-Henning and Conrail claims are barred.

Accordingly, this court concludes that:

1. The purpose of Section 77 of the former Bankruptcy Act 11 U.S.C. § 205 was to accord finality to reorganizations consummated under the Act.

2. A Section 77 claim "includes debts, whether liquidated or unliquidated, securities . . ., liens or other interests of whatever character" (former 11 U.S.C. § 205(b)) and the term "creditor" includes "all holders of claims of whatever character against the Debtor or its property." These definitions include the type of contingent or future claims asserted by La Scala-Henning and Conrail.

3. Claims were required to be filed in Section 77 reorganizations within the time fixed by the reorganization court, subject to the liberal provisions of Section 77(c)(7) for filing late claims. Under Section 77 of the Bankruptcy Act and the Bankruptcy Code, claims which were asserted after confirmation and consummation were discharged and there was no exception made for claims which were unknown to a claimant until after consummation of the Plan.

4. The La Scala-Henning and Conrail "claims" were cognizable during the reorganization proceeding

and were discharged by Orders No. 1222 and 1235 issued by this court.

5. After April 1, 1976 the Debtor's limited resources precluded its reorganization as an ongoing business entity and its Plan evolved pursuant to Section 77, as a "liquidating" plan consistent with § 601(b)(4) of the Rail Act.

6. On April 1, 1976, the bulk of the Debtor's rail properties were conveyed to Conrail, thereby concluding the Debtor's tenure as an operating railroad.

7. On consummation of the Debtor's Plan of Reorganization, the remaining property of the Debtor was transferred to the reorganized company, Erie Lackawanna Co., free and clear of any claims against that property, and Debtor's liabilities of whatever character were discharged.

8. The alleged tortfeasor Debtor Erie Lackawanna Railway Company no longer exists, and the reorganized company is not a corporate successor to the Debtor in the ordinary sense.

9. The comparative positions between La Scala-Henning and Conrail and those now holding interests in Erie, the reorganized company, and the balancing of those interests must be equated consistently with the policy dictates of Section 77. Any relief accorded to these putative claimants would ultimately prejudice the present owners and creditors of Erie by a diminution and dilution of their interests. Consequently, any relief in favor of the post confirmation putative claimants from the Order of Confirmation would be inappropriate and is denied.

10. No statutory or constitutional defects in the proof of claims program and the form notice implemented by the reorganization court having been demonstrated, the discharge under Section 77 and

the Bankruptcy Act is an absolute bar to the post confirmation claims asserted herein.

It is therefore ordered that Erie's petition for declaratory and injunctive relief is hereby granted. Attorneys for Erie shall submit an order in conformity with this decision by not later than June 30, 1985.

IT IS SO ORDERED.

/s/ ROBERT B. KRUPANSKY,
Robert B. Krupansky,
United States Circuit Judge
United States Court of Appeals
for the Sixth Circuit
Sitting by designation